DOCKET

PROCEEDINGS AND ORDERS DATE: 032985

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HORT TITLE Jones, Arthur DOCKETED: Dec 16 1984
VERSUS Alabama

Date	Proceedings and Orders
Nov 6 1984	Application for extension of time to file petition and order granting same until December 16, 1984 (Powell, November 16, 1984).
Jan 16 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 22 1985	Brief of respondent Alabama in opposition filed.
Jan 24 1985	DISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) Justice Powell OUT.

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR JONES,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

ROOSEVELT SIMMONS
VERNON Z. CRAWFORD
1407 Davis Avenue
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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

1. Whether the Advisory verdict scheme in the Alabama Death Penalty Statute is unconstitutional?

Prefix

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

ARTHUR JONES,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

The Petitioner, ARTHUR JONES, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court entered on June 8, 1984 which judgment affirmed the judgment of the Alabama Court of Criminal Appeals entered on August 16, 1983.

OPINION BELOW

The Alabama Court of Criminal Appeals entered its decision on August 16, 1983 affirming the trial court's verdict and the Judge's decision to reject the advisory opinion of the jury which sentenced petitioner to life imprisonment without parole and in rejecting said advisory opinion, the Judge set petitioner's punishment at death. A copy of the decision is attached as Appendix "A".

The Supreme Court of Alabama affirmed the decision of the Alabama Court of Criminal Appeals. A copy of the decision is attached as Appendix "B".

JURISDICTION

On June 8, 1984, the Supreme Court of Alabama affirmed the decision of the Alabama Court of Criminal Appeals which affirmed the trial court's judgment fixing petitioner's punishment at death. The jurisdiction of this Court is invoked under 28 U.S.C. 2101 and Rules 20.1 and 20.4, United States Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The Petitioner, ARTHUR JONES, was indicted on October 9, 1981 by the Grand Jury of Baldwin County, Alabama. The indictment read as follows:

> September 4, 1981, Arthur Jones a/k/a Arthur Jones, Jr., whose name is otherwise unknown to the Grand Jury other than is stated, did intentionally cause the death of Vaughn Thompson, by shooting him with a pistol and Arthur Jones a/k/a Arthur Jones, Jr., caused said death during the time that Arthur Jones a/k/a Arthur Jones, Jr., was in the course of committing, or attempting to commit, a theft of $400, the property of Vaughn Thompson, by the use of force against the person of Vaughn Thompson, with intent to overcome his physical resistance or physical power of resistance, while the said Arthur Jones a/k/a Arthur Jones, Jr., was armed with a deadly weapon, a pistol in violation of Section 2(a) (2) of Act 981-178, Acts of Alabama, against the peace and dignity of the State of Alabama. (R. 611-612)

Petitioner was determined to be an indigent by the Baldwin County Circuit Court and appointed counsel and co-counsel. (R. 616 and 619).

On November 10, 1981, Petitioner entered a plea of not guilty. (R. 617).

On January 28, 1982, a struck jury returned a verdict of guilty of the capital offense as charged in the indictment. (R. 618).

The case was submitted to the jury for recommendation of sentence. (R. 649). The jury recommended that petitioner be sentenced to life imprisonment without parole. (R. 649).

On February 19, 1982, the trial judge sentenced petitioner to death, rejecting the recommendation of the jury. (R. 607-608).

Petitioner gave notice of appeal in open court and counsel was appointed to represent petitioner on his appeal.

On August 16, 1983, the Alabama Court of Criminal Appeals affirmed the verdict and sentence of the trial court.

On June 8, 1984, the Supreme Court of Alabama affirmed the order of the Court of Criminal Appeals.

On October 20, 1984, petitioner's present counsels were contacted by the Southern Poverty Law Center, 1001 So. Hull Street, Montgomery Alabama, 36195-5101 to represent petitioner.

On the 16th day of November, 1984, the time for filing a petition for writ of certiorari to the Supreme Court of the United States was extended to December 16, 1984.

REASON FOR GRANTING THE WRIT

The Advisory scheme in the Alabama Death Penalty Statute is unconstitutional.

Petitioner contends that the advisory verdict scheme in Alabama is unconstitutional on the basis that it lack predictability and consistency.

The Legislature of Alabama passed Title 13A-5-47 of the Code of Alabama in 1981 which states in subsection (e):

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the Court.

The constitutionality of a non-binding advisory verdict system was noted by the Supreme Court of the United States in the case of Profitt v. Florida, 428 U.S. 242 (1976). This Court stated that:

> "...would appear that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore, is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252.

Petitioner contends that although a trial judge is more experienced in sentencing than a jury, the non-binding advisory verdict scheme lack predictability and consistency. In cases of a nature of capital cases there should be greater predictability so that reasonable jurors can reach a verdict that allows some predictability in the sentencing stage. In the present case the evidence against petitioner was entirely circumstantial. Should the sentence be death in a case based entirely on circumstantial evidence? This question opens the door for the possibility of an innocent man being sentenced to death.

In Tedder v. State, 322 So. 2d 908, the Florida Supreme Court made a jury advisory verdict recommending life binding on the trial judge unless he determines that the jury acted irrationally.

Judge Colquitt addressed the issue of rejecting the jury's recommendation in The Death Penalty Laws of Alabama, 33 Ala. L. Rev. 213, p. 328-329, (Winter 1982):

> "The rejection of a jury verdict is a serious matter traditionally limited by law. Although the 1981 Act makes the jury's action advisory, the jury's recommendation should not be taken lightly. Alabama appellate courts can reasonably be expected to develop and apply restrictions to a trial judge's power to reject a sentence recommended by a jury."

Petitioner contends that there must be some reason, limitation or restriction for the trial judge's rejection of the jury's advisory sentence. Such would provide safeguards and protection for the Defendant. Furthermore, such would provide predictability and consistency in capital cases.

In McCray v. Florida, 102 S. Ct. 583 (1981) (Brennan, J. dissenting from denial or certiorari) raised the above issue to a constitutional level, stating that:

> "If Florida is to use a system of advisory verdicts, it must administer that system which scrupulous fairness. Having stated that it will reject only those recommendations that are unreasonable, it must conscientiously adhere to that standard. The trial judge or the Florida Supreme Court may not allow a reasonable jury recommendation to stand in some cases, and substitute their own judgment in others. Where matters of life and death are concerned, such a lack of predictability cannot be tolerated. This Court has repeatedly emphasized the importance of consistency in capital cases."

102 S. Ct. at 584 (citations omitted).

In the present case and others since the enactment of Title 13A-5-47, Code of Alabama, 1975, as amended, the trial judge has allowed a reasonable jury's recommendation to stand in some cases and substitute their own in others. Petitioner contends that since life and death are concerned, such a lack of predictability is unconstitutional. Petitioner contends further that such a lack of consistency in capital case is unconstitutional and the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner, ARTHUR JONES. respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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10.

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte Arthur Jones

83-95

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Arthur Jones

v.

State)

BEATTY, JUSTICE.

We granted certiorari pursuant to Code of 1975, § 13A-5-53, and Rule 39(c), A.R.A.P., which provide for review as a matter of right in criminal cases in which the death penalty has been imposed as punishment. The petitioner alleges that the Court of Criminal Appeals erred in affirming the trial court's judgment denying him a new trial and in affirming

the sentence imposed by the trial court. The facts are fully set out in the opinion of the Court of Criminal Appeals. After consideration of the issues raised by the petitioner, we affirm the decision of that court.

I.

Jones urges this Court to reverse the decision of the Court of Criminal Appeals, which held that certain statements of the prosecution at trial did not create reversible error, and to remand this cause for a new trial.

We agree with the Court of Criminal Appeals that the prosecutor's statements did not cause any prejudicial misapprehension by the jury, in light of the curative instructions given by the trial court and the statements of defense counsel during closing arguments. Additionally, due to the other evidence in the case, the type of glue on the knife, referred to in closing argument, was not the "fulcrum of the State's case" as the petitioner argues in brief. We have carefully considered the petitioner's arguments, but we can find no error in the exhaustive treatment of this issue by the Court of Criminal Appeals.

II.

Jones also alleges error in the sentencing procedure, because the trial court overrode the jury's advisory verdict of life imprisonment and imposed a sentence of death. The Court of Criminal Appeals affirmed the trial court's decision, based upon Murry v. State, [Ms. March 29, 1983] ___ So. 2d ___ (Ala.Crim.App. 1983), which is currently pending before this Court on a writ of certiorari.

The statute in issue in that case and in the present one is Code of 1975, § 13A-5-47, which provides in part:

> "(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict,

> unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court." (Emphasis added.)

This statute clearly reveals the legislative intent that the jury's recommendation is advisory only and thus is not binding upon the trial court. Where plain language is used, the statute must be interpreted to mean exactly what it says. Ex parte Madison County, 406 So. 2d 398, 400 (Ala. 1981).

The petitioner concedes the constitutionality of Alabama's statutory scheme of sentencing under Proffit v. Florida, 428 U. S. 242, 252 (1976), which upheld the constitutionality of Florida's similar death penalty procedure with the following language:

> "This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Nevertheless, the petitioner urges this Court to adopt specific limitations on the trial court's power to override the jury's advisory verdict. In support of his argument that some limitations must be imposed, the petitioner cites Dobbert v. Florida, 432 U. S. 282 (1977). In that decision, the Supreme Court again reviewed the Florida death penalty statute and upheld the trial court's imposition of the death sentence, even though the jury had recommended life imprisonment, stating:

"Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:

> "'In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So. 2d 908, 910 (1975) (emphasis added) (cited with approbation in Proffitt v. Florida, 428 U. S., at 249, 96 S. Ct., at 2965).

"This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute. Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an ex post facto change in the law. Perhaps the ultimate proof of this fact is that this old statute was held to be violative of the United States Constitution in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972), while the new law was upheld by this Court in Proffitt, supra." 432 U.S. at 295-97. (Emphasis added.) (Footnote omitted.)

Petitioner argues that this language in Dobbert demonstrates that the United States Supreme Court found the Tedder rule to be a constitutional requirement when a trial court's override of a jury's advisory verdict of life imprisonment is reviewed.

It appears to this Court, however, that the United States Supreme Court, in Proffit and Dobbert, did not find the Tedder rule to be a general constitutional requirement

under a statutory scheme similar to that of Florida. Instead, the United States Supreme Court merely approved the standard which the Florida courts have adopted providing for additional protection to the defendant. Indeed, to hold otherwise would undermine the benefits of judicial sentencing praised by the United States Supreme Court in Proffitt, supra, and adopted therefrom by the Alabama legislature. Therefore, we are not required by the United States Constitution to adopt the Tedder rule.

Alabama's statute likewise affords more significant safeguards and more protection for the defendant than formerly. Death is no more automatic under Alabama's statute than under Florida's statute. The whole catalog of aggravating circumstances must outweigh mitigating circumstances before a trial court may opt to impose the death penalty by overriding the jury's recommendation. Because Alabama's statute is a clear expression of public policy as discerned by the legislature, and conforming to the statutory purpose of Florida's statute as approved by the United States Supreme Court, the petitioner's argument for the adoption of additional standards of review of a trial court's sentence was one properly addressed to the legislature.

The petitioner argues further that the trial court "made several obvious errors in its order of final sentencing." First, the trial court mentioned a description given by two witnesses of an individual leaving the store carrying a bag. The court described the bag as a brown paper one containing Tupperware which the victim's mother identified at trial as the bag in which she packed his lunch. The petitioner contends that the bag was marked for identification as State's Exhibit No. 6, but that it was never admitted into evidence. Therefore, he asserts that the trial court used a piece of evidence which was never

admitted at trial as a partial basis for the sentence overriding the jury's advisory verdict. The record does not demonstrate that the Tupperware and brown paper bag were formally introduced into evidence. However, the record does disclose that the items were marked for identification, identified by the victim's mother, who was a witness for the State, displayed before the jury, and commented upon by several witnesses. Therefore, the inescapable conclusion is that these articles were evidence in the case. Hope v. State, 378 So. 2d 745, 746 (Ala.Crim.App. 1979).

Second, the trial court stated in its findings of fact at the sentencing hearing that the state toxicologist identified a residue (glue) on the knife found in the defendant's possession as being a substance similar to that used by the victim in building a miniature log cabin. The petitioner calls this "a total misstatement of the evidence," because, he says, there was no testimony that the substance on the knife was similar to the substance used by the victim. While the State's laboratory expert did not say the glue on the knife was the same as the glue on the hobby samples which he examined, he did testify that the glues "were of the same chemical group." Therefore, the trial court did not err in its finding that the glues were "similar."

Accordingly, we find no error in either the trial proper or in the subsequent sentencing procedure "adversely affecting the rights of the defendant." Code of 1975, § 13A-5-53(a). Similarly, we agree with the Court of Criminal Appeals that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and that death was a proper sentence in this case. Therefore, the judgment of that court affirming the trial court's judgment and sentence is due to be affirmed. It is so ordered.

AFFIRMED.

All the Justices concur, except Jones, J., who concurs in the result.

JONES, JUSTICE (concurring in the result).

I concur in the result. I would adopt the Tedder rule (Tedder v. State, 322 So. 2d 908 (Fla. 1975); but, applying that standard, I would affirm the conviction and the sentence.

AUG 16 1983

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

1 Div. 377

Arthur Jones

v.

State

Appeal from Baldwin Circuit Court

HUBERT TAYLOR, JUDGE

Appellant was indicted and convicted under § 13A-5-40(a)(2), Code of Alabama 1975, for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant. After a separate hearing on aggravating and mitigating circumstances, the jury fixed appellant's punishment at life imprisonment without parole. Subsequently the trial judge weighed the aggravating and mitigating circumstances pursuant to § 13A-5-47, Code of Alabama 1975, and finding no

APPENDIX "A"

mitigating circumstances, rejected the jury's advisory verdict and fixed appellant's punishment at death. The court entered specific findings of fact which set forth the aggravating circumstances which the court found sufficient to indicate that death was the appropriate punishment.

Because this is a conviction of a capital offense resulting in a sentence of death, we will detail the crucial facts presented at trial.

Mr. Robert D. Mitchell testified that in September of 1981, he lived in a mobile home next door to The Outdoorsman store. His trailer was located approximately forty-five yards north of the store. The residence of Mr. Bobby Thompson was situated on the same side of the road, about eighty yards north of Mr. Mitchell's mobile home. Both his trailer and The Outdoorsman faced Highway 225, with the front of Mr. Mitchell's trailer sitting approximately one hundred feet closer to the highway than the front of the store. There are no woods between his trailer and The Outdoorsman.

Mr. Mitchell testified he was at his trailer preparing for bed around 8:30 p.m. on September 14, 1981, when he heard five gunshots. At that moment he was in his bedroom on the south end of his trailer. He was able to look directly out that window and see The Outdoorsman store, where he saw a man crouched down by the north side of the store. He watched as the man ran out front into the light, returned and crouched down again, and then moved slowly toward the end of the building and ran south.

The man Mr. Mitchell observed wore a white tee-shirt and dark pants. He was a black male, approximately five feet six inches in height and 140 pounds in weight.

As the man came out into the light the second time, he was carrying a brown paper sack in his left hand. In his

right hand he held a plastic garbage bag. Mr. Mitchell grabbed his gun and drove to the store, arriving just after Mr. Bobby Thompson. When he arrived, he saw the victim, Vaughn Thompson, lying face down on the ground with a gunshot wound to the head.

Mr. Bobby Thompson instructed Mr. Mitchell to remain with Mrs. Elma Thompson, and then took Mr. Mitchell's gun and left in his automobile in the direction Mitchell saw the man leave.

Mr. Bobby Thompson testified he lived on Highway 225, approximately 300 yards north of a store he owned called The Outdoorsman. He stated he was the father of the victim, Vaughn Thompson.

On September 14, 19 , around 8:30 p.m. he was in his living room when his wife ran to the door and told him she thought she heard shots from the direction of the store. As they ran to their automobile, they heard three more shots from the direction of the store. They drove to the store and while still a hundred and fifty yards from the store they saw a short black man wearing a tee-shirt run out of the store. Mr. Thompson estimated the man's weight at 135 to 140 pounds.

When the Thompsons arrived at the store, Mr. Thompson saw his son, Vaughn, lying face down in the driveway. He jumped from the automobile and held and called to his son, but received no response. He then took Mr. Mitchell's shotgun, got into his automobile and drove in the direction Mr. Mitchell saw the man run towards. He traveled only approximately fifty yards south when he saw an automobile on a dirt side-road traveling very slowly. Mr. Thompson increased his speed, but the other vehicle eluded him after three or four miles.

Although Mr. Thompson could not identify appellant as the man he observed at the store, he did recall the appellant coming into the store approximately four or five days before his son was murdered.

Mr. Thompson testified that shortly before the time of his son's death, Vaughn had been building a log cabin from match stems which he glued together onto a beverage flat. He had observed his son using a knife to rake up the matches with the glue on them in building the cabin. The knife, which Thompson stated he had seen his son use approximately forty times, was positively identified by Thompson as State's exhibit number four. He last remembered seeing the knife approximately two days before his son's death.

The victim's mother, Mrs. Elma Thompson, testified and verified her husband's testimony. She also testified that she had prepared her son's lunch earlier that day and stored it in Tupperware bowls. She had given the bowls to him that morning. Mrs. Thompson stated she was walking along Highway 225 on the side on which the store was located with several people on the morning of September 15, 1981, when her son-in-law discovered the bowls and gave them to her. She in turn gave the items to law enforcement officer Woodrow Overbey. She identified the bowls as State's exhibit six.

Robert Stewart testified he was the chief criminal investigator for Baldwin County on September 14, 1981, and that he was called upon to investigate the death of Vaughn Thompson on that date. Upon arriving at the scene he observed the victim's body lying in front of The Outdoorsman. Officer Stewart stated a bloodhound used in the investigation ran a trail from the body, around the building, over to a dirt road, and then down the dirt road to a location where a vehicle had been parked. In this area a garbage bag was observed by a Lieutenant McDowell. Officer Stewart took the bag into his possession, delivering some of its contents to the lab, and retaining other parts for use by the department in the investigation.

Officer Stewart testified he retrieved from the bag several check stubs and an envelope with the address 311 Montgomery Street. The appellant's name appeared on the check stubs, although one was printed as Arthur Jones Junior,

and the others only as Arthur Jones. Officer Stewart also retained a bandage which had strands of hair attached to it and a receipt from a Delchamps market dated September 10.

On September 16, 1981, Officer Stewart went to the 311 Montgomery Street address in Mobile, Alabama. When he arrived at that address he found the appellant sitting at a kitchen table with Detective Pickett. He identified himself to the appellant, and told him he was there to investigate a robbery-homicide. He advised appellant of his Miranda rights, and appellant agreed to talk with him. Officer Stewart recalled that at some point during this initial phase of his interrogation of appellant that appellant was cleaning his fingernails with a pocketknife.

Appellant stated that he had been at home, alone, on the evening of September 14 watching a ballgame on television. During the halftime of the ballgame, he left his apartment to get some ice cream. He did not recall having been in Baldwin County for several months prior to the interrogation by Officer Stewart.

Appellant was asked how long it had been since he had thrown garbage away and he stated it had been two weeks. When he was told that a bag of garbage containing some of his effects had been found, he recalled having dropped a bag of garbage in a trash drop at a Hess gas station during the ballgame halftime.

Appellant stated he had loaned his vehicle, described by Officer Stewart as a blue and white 1976 or 1977 Grand Prix Pontiac, to only one man. That occurred only once, three weeks prior to the interrogation.

Prior to the time frame of the crime ever having been mentioned to appellant, he volunteered the following statement to Officer Stewart:

> "Prior to his arrest, while we were still in the kitchen at his apartment talking to Mr. Jones, he just, out of the open

> air, says, 'Well, y'all are trying to put me over there at 9 o'clock when that murder happened and I wasn't there. I was here in this apartment.'"

Following the interrogation of appellant at his residence, Officer Stewart placed appellant under arrest. During a search of appellant's person pursuant to the arrest, Officer Stewart removed a small pocketknife which he later delivered to the crime lab. Stewart identified State's exhibit four as being the same knife he had removed from appellant during the search.

On cross-examination, Officer Stewart stated that a knit pullover cap that had holes for eyes cut out in it, so as to resemble a ski mask, was also found on the dirt road approximately twenty feet from where the vehicle had been parked.

Roland Howell, an investigator for the Baldwin County Sheriff's Department, stated he was present when the bag of garbage was found. He observed the name on the return address of an envelope found therein and stated the return was addressed to Abdul Sabir Bakee at 311 Montgomery Street.

Terry J. Malone testified he was the president of Industrial Services. He identified the check pay-stubs found in the garbage bag as having been issued by his company, and identified appellant as the recipient of those checks.

James L. Small, a laboratory administrator for the Department of Forensic Sciences, examined photographs of appellant's tires and of impressions made of the tracks found on the dirt road. He stated the tracks were of the same design, and that the tire in the photograph could have made the tracks in the impression. His examination of a bandage obtained from the garbage bag found on the dirt road indicated the presence of hairs from someone of the Negro race. He also examined State's exhibit four, the pocketknife, and found adhered to it the substance cyanoacrylate, commonly known as super glue.

Mark Evans testified he was employed on the three to eleven p.m. shift at the Hess Oil Company service station

on the corner of Springhill and Broad in Mobile, Alabama, on September 14, 1981. He recalled seeing the appellant come in and get gas sometime after 9 p.m. that evening. He did not see appellant place any trash in the station's dumpster. It would have been possible for someone to place trash in the dump without his knowledge, however, because he did not have a full view of it from where he worked.

Larry Shakir, a friend of appellant, testified he received a pistol from appellant on the morning of September 15. He had previously requested that appellant find him a weapon for his personal use and protection. Upon learning of the murder and of appellant's possible involvement from a news report the following morning, Mr. Shakir "panicked" and threw the gun into Mobile Bay. He did not recall the make or caliber of the gun.

Mr. Shakir also testified that at one point in time, appellant had changed his name to the Muslim name of Baagee. Because the name was Arabic, he was not sure of its pronunciation.

On examination by defense counsel, Mr. Shakir identified State's exhibit four as a knife which belonged to appellant. However, upon further examination by the State, he admitted having earlier identified another knife as the one which appellant owned. He could not say which, if either, of the knives ever belonged to appellant, but only that they were similar to appellant's knife.

Curtis Lassiter, the victim's brother-in-law, testified he found a brown grocery bag containing Tupperware on the morning after the victim was murdered. He located the bag approximately one hundred and twenty-five yards south of The Outdoorsman on the right hand side of the road. The bag was about half way between the store and the nearby dirt road. When he saw the sack it was sitting flat on the ground and the top was open. He took the bag to the store and gave it to Mrs. Thompson.

Dr. Leroy Riddick, a State forensic pathologist, testified he determined the victim's death was caused by injuries to the brain resulting from three gunshot wounds to the head and neck. The body also evidenced blunt force trauma, which indicated the victim had been struck with an object.

Bobby Stewart was recalled by the State and testified appellant told him during the conversation at appellant's house that he had recently cut his finger while changing a tire.

Mr. Bobby Thompson took the stand again and testified that after the robbery a bag containing four hundred dollars was found, as well as two hundred dollars in the cash register. Because it was time to buy gasoline and beer for the store, which were purchased in cash, there should have been approximately a thousand dollars in cash at the store. He had not seen the money, but had been told by his son that it was available in the store for those purchases.

Roland Howell retook the stand and testified The Outdoorsman was located in Baldwin County, Alabama. The State rested at the close of his testimony.

Appellant moved to dismiss the State's case for failure to establish a prima facie case in that the State failed to prove a robbery occurred. The trial court denied appellant's motion.

Arenzo Thigpen, called by appellant to testify, stated he was a friend of appellant. He recalled having twice borrowed appellant's automobile, once on a Sunday and once on a Tuesday. He denied any connection with the shooting in Baldwin County, and stated he had not been in Baldwin County within the last year.

Appellant rested at the close of Thigpen's testimony. The State presented no rebuttal, and appellant's motion to exclude the State's evidence and for a directed verdict was denied.

I

Appellant contends that reversible error occurred when the prosecutor commented on evidence which had not been formally admitted at trial while making his closing argument to the jury. The items in question, State's exhibit number six, are the Tupperware bowls and the brown paper grocery bag which contained them, which were found near the bag of garbage at the crime scene. The record reflects the following identification was made during the testimony of the victim's mother:

> "Q Mrs. Thompson, I will ask you to look into the bag that's been marked for identification as State's Exhibit Number Six. I will ask you if you can recognize the items inside the bag which have been marked for identification."
>
> ". . . .
>
> "Q I asked you to look at what's been marked for identification as State's Exhibit Six. Do you recognize that item?
>
> "A Yes, I do.
>
> "Q Could you tell the ladies and gentlemen of the Jury what that item is?
>
> "A It's the bowls, Tupperware bowls that I gave my son his lunch and breakfast in that morning, September 14th.
>
> "Q After September 14th, when was the next time you saw that item?
>
> "A The next morning, September the 15th.
>
> "Q And where did that item come from?
>
> "A It was found.
>
> "Q Where?
>
> "A On the road below the store.
>
> ". . . .
>
> "Q And was that item found -- on what side of the road, what side of 225?
>
> "A On the same side as the store.
>
> "Q Were you with the people that found the item?
>
> "A Yes, I was. We were all walking.
>
> "Q Who was that?
>
> "A My son-in-law.

> "Q Who was it given to?
>
> "A Me.
>
> "Q And after you had it, who did you give it to?
>
> "A I think Mr. Woodrow Overbey, one of the law enforcement officers. I'm almost certain it was Woodrow Overbey."

Later in the trial, Curtis Lassiter, the victim's brother-in-law, testified he found a brown grocery bag containing Tupperware on the morning following the murder. He took the bag, which he found on the ground between The Outdoorsman and the dirt road, and gave it to Mrs. Thompson.

During the presentation of the appellant's case, appellant conducted the following examination of appellant's witness Arenzo Thigpen:

> "Q I'm going to show you a bag marked as State's Exhibit Six and ask you to look inside of there.
>
> "A Okay.
>
> "MR. WILKINS: Go ahead, you can look.
>
> "THE WITNESS: (Witness reviewing instruments and documents.) What are we looking for?
>
> "BY MR. ENFINGER:
>
> "Q Did you look at the items in the bag?
>
> "A Not really. Let me check it out again. I really don't know what I am supposed to be looking for.
>
> "Q Have you ever seen those items before?
>
> "A Not as I know of. I seen a lot of items that look like that. It's Tupperware. Most housewives have them. I don't know whether I seen them before or not."

Although the record does not indicate that the Tupperware and grocery bag were formally introduced into evidence, they were marked for identification, identified by a State's witness, displayed before the jury, and commented upon by several witnesses. The articles were, therefore, evidence in the case. Hope v. State, 378 So. 2d 745 (Ala. Crim. App.), cert. denied, 378 So. 2d 747 (Ala. 1979); Simpson v. State, 51 Ala. App. 279,

284 So. 2d 734 (1973). As such, the articles were proper subjects for the prosecutor to comment upon and draw reasonable inferences from during his closing argument. Hope, supra.

The articles were repeatedly referred to by the prosecutor and appellant's counsel during their examinations of various witnesses. As indicated above, appellant's counsel questioned his own witness on direct examination concerning the articles. Both parties having treated the articles as evidence in the presence of the jury, there is no error. Colston v. State, 371 So. 2d 471 (Ala. Crim. App. 1979).

Moreover, our review of the record indicates that it was appellant's own counsel who first commented upon the articles during closing arguments as follows:

> "Nonetheless, he was going back and forth there, the short black man, you know, even though the vision was so good to say it was a short black man and had on a t-shirt and low and behold, here he is carrying this paper bag, and I believe, it was this paper bag.
>
> "Ladies and gentlemen, there is no doubt about it. That's just reasonable. This paper bag, and then, some kind of dark plastic bag, garbage bag.
>
> ". . . .
>
> "No question that the Tupperware was found out there. No question about that whoever was running away from that store was carrying that Tupperware.
>
> ". . . .
>
> "But let's clear away the smoke screen that the DA has tried to put in here about the garbage and the glue on the knife. The knife, the Tupperware, and all of this other stuff."

We fail to see, therefore, how appellant could have been harmed by the prosecutor's similar reference to the articles during his subsequent closing argument.

II

Appellant contends the wording of the warning he received prior to making a statement to police was insufficient to advise him of his constitutional rights under Miranda v.

Arizona, 384 U.S. 436 (1966). Hence, he argues his statements were inadmissible at trial.

Officer Robert Stewart testified he advised appellant of his constitutional rights in the following manner prior to interrogating him at his home on September 16, 1981:

> "Q Now, what is that card, if you will?
>
> "A It's a warning of constitutional rights and a waiver.
>
> "Q And how did you use that card to assist you?
>
> "A I used it in reading the Defendant his constitutional rights.
>
> "Q And would you read to this Jury the rights that you read to the Defendant at that time?
>
> "A Yes, sir. 'You have the right to talk to a lawyer, have him with you while you are being questioned, if you want a lawyer but cannot afford one, the Court will appoint one for you.
>
> "'You have the right to remain silent, anything you say can and will be used against you in a Court of law.'
>
> "Q All right, sir. Where were you when this was done?
>
> "A Seated at the kitchen table.
>
> "Q Who else was seated at the table?
>
> "A Mr. Jones and Detective Pickett and Roland Howell; but I also went one step farther and advised him that should he decide to talk to us and any time during that conversation that he wished to, he could stop talking and request an attorney at any time."

Officer Wayne Ivie testified that he also read appellant his constitutional rights, shortly before Officer Stewart arrived at appellant's home on September 16, 1981. Officer Ivie testified he instructed appellant as follows:

> "A Yes, sir. I advised him that he had the right to remain silent and anything that he said could and would be used against him in a Court of law, that he had the right to have an attorney present, and if he couldn't afford an attorney, one would be appointed for him. And at any time during the questioning, if he so

desired, the questioning would be stopped. I asked Mr. Jones if he understood the rights and he replied that he did.

"Q Was anyone else present at the time?

"A Sergeant Pickett."

Officer Walter Pickett testified he was present and heard both Officer Stewart and Officer Ivie advise appellant of his constitutional rights.

Appellant, citing an annotation which follows the Miranda decision at 16 L. Ed. 2d 1294, contends the warnings appellant received were insufficient in particular because they failed to use the precise language as formulated in the annotation, which states that a suspect "has the right to consult with, and have present prior to and during interrogation, an attorney either retained or appointed . . . ." 16 L. Ed. 2d 1300. (Emphasis added.) Appellant's argument has specific reference to the officer's failure to use the term "prior to" in warning appellant of his right to counsel.

The Miranda decision requires no talismanic formulation of the warnings to be given to a criminal defendant as to the constitutional rights protected by that decision. California v. Prysock, 453 U.S. 355 (1981). Reviewing the language used to inform the appellant herein of his right to appointed counsel, we find, as did the court in Prysock, supra, that "[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning . . . or in which the offer of an appointed attorney was associated with a future time in court. . . ." Prysock, supra, at 361. (Citations omitted.) There was no error in this regard.

III

Appellant asserts the trial court's action in rejecting the advisory sentence of life without parole recommended by the jury, in order to elevate his sentence to death,

was error. Appellant's arguments have been precluded, however, by our recent decision in Murray v. State, [Ms. 3 Div. 604, March 29, 1983] ____ So. 2d ____ (Ala. Crim. App. 1983). There was no impropriety in the trial judge's decision to sentence appellant to death.

IV

During the State's closing argument, the following appears in reference to the knife found on appellant's person at the time of his arrest:

"Vaughn Thompson's father identified that item for you. And that time, when Arthur Jones was placed under arrest, this item of evidence was found in Arthur Jones' pocket. This item of evidence had the glue on it that that young Thompson boy was making his little model hobby with. And this item, this item came out of Vaughn Thompson's pocket and wound up in the Defendant's pocket. That's what the lab man said. He said the glue on that knife was consistent with the type of glue that was found that Vaughn Thompson had been using at the store.

"MR. ENFINGER: Judge, we're going to object to the prior remark made by the Prosecutor on the basis that there was no testimony from any State's witness that that glue that was found on the blade of the knife was found at the scene of the crime.

"THE COURT: Ladies and gentlemen of the Jury, let me instruct you at this time that you are only to consider the evidence that you have heard from the witness stand and only what your recollection of what that evidence is and not what the attorneys are saying to you. They are only arguing the case to you as to how they remember it and how they recollect it. The facts as they best remember is what they are trying to portray. They are gathering their reasonable inference therefrom, so you consider only what comes from the witness stand as you remember it."

Appellant argues that the prosecutor's remark misstated the testimony and stated a fact which was not supported by the evidence, thus creating reversible error. The State on appeal does not deny that there was never any evidence

presented that the laboratory expert stated the glue used on the cabin model, nor any glue samples taken from the victim's possession at the scene of the crime, were of the same glue type as that found on the knife.

In the State's closing argument in rebuttal, erroneous reference was again made to the laboratory expert's testimony, as appears below:

> "And I want you to look at that knife when you get it back there in that Jury Room. You look at that knife very closely. You look up under this thing and you look at it and you see what that substance is that's on the knife. Mr. Small told you from the lab that it was a kind of whatever type glue he said. It was the same type glue used in the model, a Superglue."

The testimony of the laboratory expert, Mr. James Small, indicated his tests revealed that the material on the knife was a glue of the cyanocrylate group. He also stated that four samples of glue he received from Officer Roland Howell were of the same cyanoacrylate group as the glue on the knife. However, there was no testimony by Mr. Small, Officer Howell, or anyone else as to the origin of the glue samples obtained by the officer which were compared with the glue on the knife.

Mr. Small also testified that he received a "model," a bottle labeled as Elmer's glue, and a jar lid containing glue from Officer Stewart. There was no testimony, however, that any of those items contained glue of the cyanoacrylate group.

While counsel should have wide latitude in arguing reasonable inferences from the evidence, counsel should not be allowed to argue as a fact that which is not supported by the evidence presented during trial. Brown v. State, 374 So. 2d 391 (Ala. Crim. App.), affirmed, 374 So. 2d 395 (Ala. 1979). It is without question that the prosecutorial arguments quoted above were factual misstatements of Mr. Small's testimony which fall within this prohibition. When the prosecutor

asserts a fact not in evidence, which is prejudicial to the accused, error occurs. Diamond v. State, 363 So. 2d 169 (Ala. Crim. App. 1978). However, not every argument of a fact not in evidence is so prejudicial as to necessarily affect the substantial rights of the defendant. See, Brown, supra at 396; Flint v. State, 370 So. 2d 332 (Ala. Crim. App. 1979).

In order for unsupported prosecutorial statements of fact to require reversal, the objectionable statements must be (1) made as of fact, (2) without support by any evidence, (3) pertinent to the issues, and (4) have a natural tendency to influence the finding of the jury. Tillman v. State, 374 So. 2d 922 (Ala. Crim. App. 1978), cert. quashed, 374 So. 2d 927 (Ala. 1979); Flint, supra.

The prosecutorial statements in question clearly violated factors (1) and (3) above. The prosecutor's argument was phrased as a statement of fact, and not as an inference from the facts. The knife's connection to the victim by the presence of the same type of glue as used in the victim's cabin model was clearly pertinent in proving the State's entirely circumstantial case.

As to factor (2), we cannot say that the prosecutor's argument was entirely unsupported by any evidence at trial. The scientific expert did testify that the glue on the knife and certain glue samples from the officers investigating the case were of the same chemical group. The prosecutor may have argued as a legitimate inference from the testimony that a knife which was both identified by the victim's father and which bore evidence of glue must have been the victim's knife. Yet, there still was no basis for his statement that the expert actually identified the glue samples from the crime scene as the same type as the glue on the knife.

We look finally, and crucially, then, at factor (4) to determine whether the natural tendency of this misstatement of the expert's testimony was to influence the finding of the jury against appellant's interests.

The State's case against appellant, while entirely circumstantial, was in no wise dependent upon the expert's testimony on the identity of the glue type to establish an overwhelming case against appellant. Eye witnesses described the assailant's race, height and weight, although they were unable to identify him because of the distance from which they viewed him. One witness could see that the assailant carried a brown paper sack and a plastic garbage bag. The victim's father observed an automobile on a nearby dirt road which was located in the direction he had seen the assailant flee. He gave chase, but eventually lost the automobile. The victim's father also positively identified the knife found in appellant's possession as the one his son had owned.

Bloodhounds brought to the murder scene tracked a trail directly to the dirt road where an automobile had been parked. In this area, a bag of garbage containing check stubs with appellant's name, an envelope with appellant's return address, and a bandage with strands of hair of Negro origin were found. Between the store and the dirt road, a brown paper sack containing Tupperware from the victim's lunch was found.

When police arrived to investigate appellant, they found in his possession a knife later identified by the victim's father as belonging to the victim. When questioned about discarding garbage, appellant changed his story about not disposing of any refuse, upon learning garbage had been found which was connected to him. Appellant admitted having recently cut his finger, but denied being in Baldwin County. His story

about discarding the garbage at the Hess station was refuted by police investigation of the station attendant. Finally, without having been told of the time frame of the crime, appellant volunteered a denial of having been at the crime scene at the very time the crime was committed.

Laboratory expert Small testified a tire print taken from the dirt road was of the same design as the tread of the tires on appellant's automobile. And while the expert never connected the glue on the knife with the glue from the crime scene, he did find that glue was present on the knife. The victim's father had earlier testified that his son used his knife in gluing match sticks on a model of a cabin. Thus the identification of the glue would only be cumulative evidence of the identification of the knife previously made by the victim's father.

A friend of appellant's testified to having received a gun from appellant on the morning following the murder, which he later disposed of because he feared it was connected to the murder.

In light of the entirety of the circumstantial evidence against appellant, we do not view the prosecutor's misstatement in question as having a natural tendency to influence the jury against appellant so as to have denied appellant of a fair trial. Flint, supra. We find this to be a case where the evidence as to the identity of appellant was so overwhelmingly in favor of the state that it is inconceivable that a reasonable jury would have returned a verdict of not guilty. See Brown, supra. The argument of a fact not in evidence was not so prejudicial as to have necessarily affected the substantial rights of appellant. See, Brown, supra, at 396.

We are influenced too by the fact that the trial court did not overrule appellant's objection, but rather immediately proceeded to instruct the jury as quoted supra. Appellant did not further pursue his objection, which may be taken to indicate

he found the judge's instruction sufficient at that time to cure any misapprehension by the jury. As well, appellant's counsel stated the following to the jury in closing argument which followed the prosecutor's initial statement:

> "Now, a pocketknife, I guess a lot of gentlemen have pocketknives; but using pocketknives, they use them on all kinds of things. So many things, you can use them for so many things but you remember when I kept asking that man about the different qualities of that glue and could it have been any other type of glue and don't all these types of other glues have certain kinds of qualities. And you know, there was never any glue introduced that... where the DA brought it in and said, look, this was the glue that the young Thompson fellow used working with his model and used working with his knife. Now, did you run tests on that specific glue? Did they? That was never mentioned."

Finally, the trial court instructed the jury during its oral charge as appears below:

> "The statements or assertions of counsel are not evidence in the case. You take the testimony of the witnesses together with all proper and reasonable inferences therefrom, apply your common sense, and in an honest and impartial way, you determine what you believe to be the truth."

In light of these actions, we do not believe the prosecutor's statement created reversible error. See, Weaver v. State, 402 So. 2d 1099 (Ala. Crim. App. 1981); Meridith v. State, 370 So. 2d 1075 (Ala. Crim. App.), cert. denied, 370 So. 2d 1079 (1979).

V

Reviewing this case in light of § 13A-5-53(a), Code of Alabama 1975, we find that:

(1) there was no error adversely affecting the rights of the appellant made in the sentencing hearing;

(2) the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence 1/;

(3) that death was the proper sentence in this case.

1/ The trial court's findings of fact, setting forth its findings as to aggravating and mitigating circumstances, are attached as Appendix A.

In determining the propriety of the sentence of death, we have determined in accordance with § 13A-5-53(b), Code of Alabama 1975, that the record indicates no evidence that the trial judge imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Our independent weighing of the aggravating and mitigating circumstances evidenced by the record places us in accord with the trial judge's decision to fix appellant's punishment at death. We find, as did the trial judge, no evidence that any mitigating circumstances existed, statutory or otherwise, in appellant's favor. We agree with the trial court's finding of the three aggravating circumstances.

The record indicates the crime was committed while appellant was under sentence of imprisonment, although he was serving the latter part of this sentence while on parole. Also sustained by the record is the trial court's finding that appellant was previously convicted of another felony involving the use or threat of violence to the person. Finally, the evidence presented at trial supports the trial judge's finding that the capital offense was committed while the appellant was engaged in the commission of a robbery.

Weighing the gravity of the aggravating circumstances against the total lack of mitigating circumstances, we are of the opinion that the death penalty is the proper sentence in this case.

Our review assures us that the death penalty is being imposed in similar cases, and therefore the sentence of death is not excessive or disproportionate as applied to the appellant in this case. See Watkins v. State, [Ms. 6 Div. 925, July 5, 1983] ___So. 2d ___(Ala. Crim. App. 1983); Crowe v. State, [Ms. 6 Div. 9, July 5, 1983] ___So. 2d ___ (Ala. Crim. App. 1983).

No error prejudicial to the substantial rights of appellant having been found, this case is affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

STATE OF ALABAMA	I	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
Plaintiff,	I	
VS.	I	CRIMINAL DIVISION
ARTHUR JONES a/k/a ARTHUR JONES, JR.	I	
Defendant.	I	CASE NO. CC 81-610

SUMMARY OF FINDING OF FACTS FROM THE TRIAL

On September 14, 1981, several witnesses heard gun shots being fired at the Outdoorsman Store located on Alabama Highway 225 where Baldwin County Road 40 intersects said highway in Baldwin County, Alabama. Two of the witnesses gave a general description of the individual leaving the said store carrying in each hand a bag. One of the bags was identified as a brown paper bag. The description met the general description of the Defendant. This person proceeded from the store and went in a southerly direction to an infrequently used dirt road. A short time after this a car sped out of the said dirt road on Highway 225 and went in a southerly direction at a high rate of speed towards the Mobile Bay Causeway. Approximately one-half the distance between the Outdoorsmon Store and from the point which the said vehicle left, was found a brown paper bag containing tupperware which the victim's mother identified his noon lunch had been in. At a point where the car sped away, was found a garbage bag which contained check stubs and envelopes on which was written the Defendant's name and address. The Defendant stated he had not been in Baldwin County in six or seven weeks. Bloodhounds traced a path which matched the movements of the person described by the witnesses to a point where the garbage was found and the car sped away. There was also found there in the garbage a bandage.

Photographs were made of the tire tracks on this road which was testified to by a State Toxicologist as being similar to those tires found on the Defendant's vehicle. The State Toxicologist also testified that there were hairs on the bandage which could be positively identified as those of a black person, Defendant being of the black race.

When the Defendant was being interrogated by a Baldwin County Investigator, the Defendant said that they coundn't put him in Baldwin County at the Outdoorsman Store at 9:00 p.m. of the night of the shooting. When asked how he knew what time the shooting occurred, he became nervous and upset and had no explanation. The Defendant also told the officers that he had a cut and had thrown the bandage which he had placed on it in his garbage. When first questioned by the investigators concerning garbage, the Defendant said that he had had no garbage for approximately ten days to two weeks. On being informed that a sack of garbage with the items as mentioned above was found near the scene of the crime, the Defendant changed his story and he told them that he had a few days prior to that time taken his garbage to a Hess Service Station and was directed by the attendant where to deposit it. The Defendant identified the attendant at the station to the investigators and the attendant at trial denied having directed the Defendant where to deposit his garbage. The Defendant denied to the investigators that he had a pistol, but a witness testified that the day following the robbery that the Defendant gave him a pistol. A day or so later when the witness heard that the Defendant had been charged with the murder of Vaughn Thompson, he became frightened and drove to the Mobile Bay Highway and threw the pistol in the bay.

At the time that the Defendant was arrested, a knife was found on the Defendant which the victim's father identified as belonging to the victim. There was residue on the knife which the State Toxicologist identified as being a similar substance.

The jury concluded beyond a reasonable doubt from this and other evidence that the Defendant was guilty of the Capital Offense of Robbery Murder as charged in the indictment. The Court concurred in their verdict.

SENTENCING HEARING BY THE COURT

The Court having conducted a hearing pursuant to Title 13A-5-47 of the Code of Alabama, 1975, as amended to determine whether or not the Court will sentence Arthur Jones a/k/a Arthur Jones, Jr. to death or to life imprisonment without parole and the Court having considered the evidence presented at the trial and at the sentencing hearing before the jury and the hearing conducted before the Court along with the pre-sentence investigation report which has been made part of this record, the Court makes the following determination.

AGGRAVATING CIRCUMSTANCES

The Court first considers the aggravating circumstances as outlined and described in Title 13A-5-49, Code of Alabama:

(1) The Court finds that the capital offense was committed by Arthur Jones a/k/a Arthur Jones, Jr. while he was under sentence of imprisonment, although he was serving the latter part of his sentence on parole at the time;

(2) The Court finds that the deferdant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The Court finds that there is no evidence that the Defendant did knowingly create a great risk of death to many persons;

(4) The Court finds the capital offense was committed while the Defendant was engaged in the commission of a robbery;

(5) The Court finds the capital offense was not committed for the purpose of avoiding or preventing a lawful

arrest effecting an escape from custody;

(6) The Court finds that the capital offense was not committed for pecuniary gain;

(7) The Court finds the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(8) The Court finds that the capital offense was not especially heinous, atrocious or cruel compared to other capital offenses;

The Court finds beyond a reasonable doubt that the aggravating circumstances described in Title 13A-5-49 and set out above in subparagraphs (1), (2) and (8) particularly apply to the Defendant Arthur Jones a/k/a Arthur Jones, Jr. in this case.

MITIGATING CIRCUMSTANCES

The Court now consideres the mitigating circumstances as described and set out in Title 13A-5-51, Code of Alabama:

(1) The Court finds that the Defendant has a significant history of prior criminal activity;

(2) The Court finds that the capital offense was not committed while the Defendant was under the influence of extreme mental or emotional disturbance;

(3) The Court finds that the victim was not a participant in the Defendant's conduct or consented to it;

(4) The Court finds that the Defendant was not an accomplice in the capital offense committed, but was in fact the principal who robbed and intentionally killed the victim Vaughn Thompson;

(5) The Court finds that the Defendant did not act under extreme duress or under the substantial domination of another person;

(6) The Court does not find that the capacity of the

Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The Court finds that the age of the Defendant is not a mitigating circumstance.

CONCLUSION

The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing them, the Court is convinced beyond a reasonable doubt and to a moral certainty and it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty should be imposed.

The Court is fully aware of the great responsibility that is placed on the trial judge in cases of this magnitude. The Court struggled long and hard with the decision that it must make in this case, and in making the determination to override the decision of the jury's advisory sentence of life imprisonment without parole. The Court must follow the dictates of its own conscience.

The Court is not chastising or inferring that the jury was lax in their responsibility. The Court feels that it is its responsibility to follow the law as written, and that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes an businesses.

The Court therefore, rejects the advisory sentence of the jury in this case.

It is therefore, considered and adjudged by the Court that Arthur Jones a/k/a Arthur Jones, Jr. is guilty of the capital offense charged in the indictment and that he intentionally killed Vaughn Thompson in the course of a robbery in the first degree.

Arthur Jones, do you have anything to say before the sentence of law is passed on you? The Defendant has nothing to say.

It is ORDERED, ADJUDGED and DECREED that you, Arthur Jones a/k/a Arthur Jones, Jr. suffer death by electrocution at any time before the hour of sunrise on the twentieth (20th) day of May, 1982 inside the walls of William C. Holman Unit of the Prison System at Atmore, Alabama in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is therefore, further ORDERED, ADJUDGED and DECREED by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in case of his death, disability or absence, his deputy or in the event of the death, disability or absence of both the Warden and his deputy, then the person designated Administrator by law for such purpose at any time before the hour of sunrise shall on the twentieth day of May, 1982 inside the walls of William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Arthur Jones, a/k/a Arthur Jones, Jr. , a current of electricity of sufficient intensity to cause his death and the continual application of such current through the body of the said Arthur Jones a/k/a Arthur Jones, Jr. until the said Arthur Jones a/k/a Arthur Jones, Jr. be dead, and may Almighty God have mercy on your soul.

ORDERED this 19th day of February, 1982.

CIRCUIT JUDGE
Twenty-eighth Judicial Circuit
Baldwin County, Alabama

OPPOSITION BRIEF

84-6089

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ARTHUR JONES,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

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QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner raises a question which was neither presented to nor decided by the state supreme court to which petitioner seeks to have the writ issued, does this Court have jurisdiction to decide the question?

2. If this Court does have jurisdiction, does the Constitution require that any specific weight be given to a jury's advisory sentence verdict in a capital punishment system?

PARTIES

The caption contains the names of all the parties in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The decision of the Alabama Supreme Court is reported as Ex parte Jones, 456 So.2d 380 (Ala. 1984), and a copy of it is attached to this brief as Appendix A. The decision of the Alabama Court of Criminal Appeals is reported as Jones v. State, 456 So.2d 366 (Ala.Cr.App. 1983), and a copy of it is attached to this brief as Appendix B.

JURISDICTION

In an order dated November 16, 1984, Justice Powell extended petitioner's time for filing the certiorari petition to and including December 16, 1984. The certificate of service and affidavit of mailing attached to the petition, show that it was not filed until December 17, 1984. Therefore, the petition is not timely filed.

However, the State of Alabama does not request that the petition be denied because of untimely filing.

Irrespective of whether the petition was timely filed, this Court does not have jurisdiction of it, because the question presented in it was neither presented to nor decided by the Alabama Supreme Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented in the petition raises issues involving the Eighth and Fourteenth Amendments. It also involves Code of Alabama 1975, §13A-5-47(e) which provides:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been weighed pursuant to section

> 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

That provision is part of Alabama's 1981 capital punishment statute, which is reproduced as Appendix C to this brief.

STATEMENT OF THE CASE

For present purposes, the chronology of events set out in the "Statement of the Case" and "Statement of the Facts" in the petition is sufficiently correct.

However, it should be noted that in his written sentence orders, after specifying the aggravating and mitigating circumstances, the trial court gave the following explanation about why it had decided to override the jury's sentence recommendation:

> The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing them, the Court is convinced beyond a reasonable doubt and to a moral certainty and it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty should be imposed.
>
> The Court is fully aware of the great responsibility that is placed on the trial judge in cases of this magnitude. The Court struggled long and hard with the decision that it must make in this case, and in making the determination to override the decision of the jury's advisory sentence of life imprisonment without parole. The Court must follow the dictates of its own conscience.
>
> The Court is not chastising or inferring that the jury was lax in their responsibility. The Court feels that it is its responsibility to follow the law as written, and that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and businesses.
>
> The Court therefore, rejects the advisory sentence of the jury in this case.

Jones v. State, 456 So.2d 366, 379 (Ala.Cr.App. 1983) [App. B, hereto].

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO DECIDE THE CONSTITUTIONALITY OF THE ADVISORY VERDICT SYSTEM IN ALABAMA'S 1981 CAPITAL PUNISHMENT STATUTE, BECAUSE THAT ISSUE WAS NEITHER RAISED IN NOR DECIDED BY THE ALABAMA SUPREME COURT

Petitioner asks this Court to issue a writ of certiorari to the Alabama Supreme Court, however, the sole issue raised in his petition was neither presented to nor decided by the Alabama Supreme Court. Instead, petitioner conceded in the state supreme court that the advisory verdict sentencing scheme was constitutional, and simply urged the court to adopt specific limitations on the trial court's power to override the jury's advisory verdict. See, Ex parte Jones, 456 So.2d at 381-382 [App. A, hereto].

Because petitioner did not present the question concerning the constitutionality of Alabama's advisory verdict sentencing system to the Alabama Supreme Court and it was not decided by that court, this Court need not decide the question, Moore v. Illinois, 408 U.S. 786, 799 (1972); should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); and has no jurisdiction to decide it. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257 (2) and (3).

II. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED IS NOT A SUBSTANTIAL ONE

In the alternative, the petition should be denied because the question presented is not a substantial one. In Spaziano v. Florida, 104 S.Ct. 3154 (1984), this Court upheld the constitutionality of an advisory jury verdict mechanism in a capital punishment sentencing system. It is

true that the Florida system upheld in Spaziano contained the Tedder v. State, 322 So.2d 908 (Fla. 1975), limitation, which the Alabama system does not, Ex parte Jones, 456 So.2d 380, 382-383 (Ala. 1984). However, this Court's decision in Spaziano makes it clear that the Tedder rule is not constitutionally required.

This Court specifically held in Spaziano that there was no constitutional requirement for any jury input at all in capital sentencing. Id., at 3163, 3165. If the Constitution does not require any jury input at all in capital sentencing, which is what this Court held in Spaziano, then it follows that the Constitution does not require that jury input which is statutorily provided be given any particular weight.

In Spaziano this Court stated as follows:

> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla.Stat. § 921.141(3) (Supp. 1984). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. § 921.141(4). As Justice STEVENS noted in Barclay, there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overriden the jury's recommendation and sentenced the defendant to death. See Barclay v. Florida, ___ U.S., at ___, and n. 23, 103 S.Ct., at 3436, and n. 23 (opinion concurring in the judgment).

104 S.Ct. at 3166. Precisely the same is true about Alabama's 1981 capital punishment statute.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL
BY-

Ed Carnes

EDWARD E. CARNES
ALABAMA ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Hon. Vernon S. Crawford
Hon. Roosevelt Simmons
1407 Davis Avenue
Mobile, Alabama 36603

I further certify that I have served all parties required to be served.

Ed Carnes

EDWARD E. CARNES
ALABAMA ASSISTANT ATTORNEY GENERAL

APPENDIX A—Continued

his death and the continual application of such current through the body of the said Arthur Jones a/k/a Arthur Jones, Jr. until the said Arthur Jones a/k/a Arthur Jones, Jr. be dead, and may Almighty God have mercy on your soul.

ORDERED this 19th day of February, 1982.

/s/ Harry J. Wilters, Jr.
CIRCUIT JUDGE
Twenty-eighth Judicial Circuit
Baldwin County, Alabama

Ex parte Arthur JONES.

(Re Arthur Jones

v.

State).

83-80.

Supreme Court of Alabama.

June 8, 1984.

Rehearings Denied Aug. 24, 1984 and Sept. 17, 1984.

Defendant was convicted in the Circuit Court, Baldwin County, Harry J. Wilters, Jr., J., of murder during a robbery in the first degree or an attempt thereof committed by defendant, and he appealed. The Court of Criminal Appeals, 436 So.2d 366, affirmed. On grant of certiorari, the Supreme Court, Beatty, J., held that: (1) certain statements of prosecution at trial did not create reversible error; (2) it was proper for trial court to override jury's advisory verdict of life imprisonment and impose sentence of death; (3) although certain items which trial court mentioned in sentencing were not formally introduced into evidence, such articles were "evidence" in the case; (4) trial court did not err in finding that glue on knife found in defendant's possession was a substance "similar" to that used by victim in building miniature log cabin; (5) trial court's findings concerning aggravating and mitigating circumstances were supported by evidence; and (6) death was a proper sentence.

Affirmed.

Jones, J., concurred in result and filed opinion.

1. Homicide ⇐334

In prosecution for murder during robbery in first degree or attempt thereof committed by defendant, it was proper for trial court to override jury's advisory verdict of life imprisonment and impose sentence of death. Code 1975, § 13A-5-47.

2. Statutes ⇐188

Where plain language is used, statute must be interpreted to mean exactly what it says.

3. Criminal Law ⇐685

United States Constitution does not require Supreme Court to adopt *Tedder* rule that, in order to sustain sentence of death following jury recommendation of life, facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Code 1975, § 13A-5-47.

4. Criminal Law ⇐946.1

Although certain items which trial court mentioned in sentencing were never formally introduced into evidence, the articles were "evidence" in case in which the items were marked for identification, identified by state's witness, displayed before jury, and commented upon by several witnesses.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐754

In murder prosecution, trial court did not err in finding that glue on knife found in defendant's possession was substance "similar" to that used by victim in building a miniature log cabin, in view of testimony

Appendix A

of state's laboratory expert that the glues were "of the same chemical group."

Julian B. Brackin and W. Donald Bolton, Jr. of Foster, Brackin & Bolton, Foley, for petitioner.

Charles A. Graddick, Atty. Gen., and Edward Carnes and Martha Gail Ingram, Asst. Attys. Gen., for respondent.

BEATTY, Justice.

We granted certiorari pursuant to Code of 1975, § 12A-5-53, and Rule 39(c), A.R.A.P., which provide for review as a matter of right in criminal cases in which the death penalty has been imposed as punishment. The petitioner alleges that the Court of Criminal Appeals, 436 So.2d 366, erred in affirming the trial court's judgment denying him a new trial and in affirming the sentence imposed by the trial court. The facts are fully set out in the opinion of the Court of Criminal Appeals. After consideration of the issues raised by the petitioner, we affirm the decision of that court.

I.

Jones urges this Court to reverse the decision of the Court of Criminal Appeals, which held that certain statements of the prosecution at trial did not create reversible error, and to remand this cause for a new trial.

We agree with the Court of Criminal Appeals that the prosecutor's statements did not cause any prejudicial misapprehension by the jury, in light of the curative instructions given by the trial court and the statements of defense counsel during closing arguments. Additionally, due to the other evidence in the case, the type of glue on the knife, referred to in closing argument, was not the "fulcrum of the State's case" as the petitioner argues in brief. We have carefully considered the petitioner's arguments, but we can find no error in the exhaustive treatment of this issue by the Court of Criminal Appeals.

II.

[1, 2] Jones also alleges error in the sentencing procedure, because the trial court overrode the jury's advisory verdict of life imprisonment and imposed a sentence of death. The Court of Criminal Appeals affirmed the trial court's decision, based upon *Harris v. State*, 455 So.2d 53 (Ala.Crim.App.1983), which is currently pending before this Court on a writ of certiorari.

The statute in issue in that case and in the present one is Code of 1975, § 13A-5-47, which provides in part:

"(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). *While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.*" (Emphasis added.)

This statute clearly reveals the legislative intent that the jury's recommendation is advisory only and thus is not binding upon the trial court. Where plain language is used, the statute must be interpreted to mean exactly what it says. *Ex parte Madison County*, 436 So.2d 286, 288 (Ala.1983).

[3] The petitioner concedes the constitutionality of Alabama's statutory scheme of sentencing under *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976), which upheld the constitutionality of Florida's similar death penalty procedure with the following language:

"This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770 [n. 15], 1775, 20 L.Ed.2d 776 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judi-

cial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Nevertheless, the petitioner urges this Court to adopt specific limitations on the trial court's power to override the jury's advisory verdict. In support of his argument that some limitations must be imposed, the petitioner cites *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In that decision, the Supreme Court again reviewed the Florida death penalty statute and upheld the trial court's imposition of the death sentence, even though the jury had recommended life imprisonment, stating:

"Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:

"'In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' *Tedder v. State*, 322 So.2d 908, 910 (1975) (emphasis added) (cited with approbation in *Proffitt v. Florida*, 428 U.S., at 249, 96 S.Ct., at 2965).

"This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. *A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder.* Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute. Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law. Perhaps the ultimate proof of this fact is that this old statute was held to be violative of the United States Constitution in *Donaldson v. Sack*, 265 So.2d 499 (Fla.1972), while the new law was upheld by this Court in *Proffitt, supra*." 432 U.S. at 296-97, 97 S.Ct. at 2299-2300. (Emphasis added.) (Footnote omitted.)

Petitioner argues that this language in *Dobbert* demonstrates that the United States Supreme Court found the *Tedder* rule to be a constitutional requirement when a trial court's override of a jury's advisory verdict of life imprisonment is reviewed.

It appears to this Court, however, that the United States Supreme Court, in *Proffitt* and *Dobbert*, did not find the *Tedder* rule to be a general constitutional requirement under a statutory scheme similar to that of Florida. Instead, the United States Supreme Court merely approved the standard which the Florida courts have adopted providing for additional protection to the defendant. Indeed, to hold otherwise would undermine the benefits of judicial sentencing praised by the United States Supreme Court in *Proffitt, supra*, and adopted therefrom by the Alabama legislature. Therefore, we are not required by the United States Constitution to adopt the *Tedder* rule.

Alabama's statute likewise affords more significant safeguards and more protection for the defendant than formerly. Death is no more automatic under Alabama's statute than under Florida's statute. The whole catalog of aggravating circumstances must outweigh mitigating circumstances before a trial court may opt to impose the death penalty by overriding the jury's recommendation. Because Alabama's statute is a clear expression of public policy as

(Ala.Cr.App. 1980)

decreed by the legislature, and conforming to the statutory purpose of Florida's statute as approved by the United States Supreme Court, the petitioner's argument for the adoption of additional standards of review of a trial court's sentence was one properly addressed to the legislature.

(4) The petitioner argues further that the trial court "made several obvious errors in its order of final sentencing." First, the trial court mentioned a description given by two witnesses of an individual leaving the store carrying a bag. The court described the bag as a brown paper one containing Tupperware which the victim's mother identified at trial as the bag in which she packed his lunch. The petitioner contends that the bag was marked for identification as State's Exhibit No. 6, but that it was never admitted into evidence. Therefore, he asserts that the trial court used a piece of evidence which was never admitted at trial as a partial basis for the sentence overriding the jury's advisory verdict. The record does not demonstrate that the Tupperware and brown paper bag were *formally* introduced into evidence. However, the record does disclose that the items were marked for identification, identified by the victim's mother, who was a witness for the State, displayed before the jury, and commented upon by several witnesses. Therefore, the unexplained conclusion is that these articles were evidence in the case. *Hope v. State*, 378 So.2d 745, 746 (Ala.Crim.App.1979).

(5) Second, the trial court stated in its findings of fact at the sentencing hearing that the state toxicologist identified a residue (glue) on the knife found in the defendant's possession as being a substance similar to that used by the victim in building a miniature log cabin. The petitioner calls this "a total misstatement of the evidence," because, he says, there was no testimony that the substance on the knife was similar to the substance used by the victim. While the State's laboratory expert did not say the glue on the knife was the *same* as the glue on the hobby samples which he examined, he did testify that the glues "were of the same chemical group." Therefore, the trial court did not err in its finding that the glues were "similar."

Accordingly, we find no error in either the trial proper or in the subsequent sentencing procedure "adversely affecting the rights of the defendant." Code of 1975, § 12-3-16(a). Similarly, we agree with the Court of Criminal Appeals that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and that death was a proper sentence in this case. Therefore, the judgment of that court affirming the trial court's judgment and sentence is due to be affirmed. It is so ordered.

AFFIRMED.

All the Justices concur, except JONES, J., who concurs in the result.

JONES, Justice (concurring in the result).

I concur in the result. I would adopt the *Tedder* rule (*Tedder v. State*, 322 So.2d 908 (Fla.1975)), but, applying that standard, I would affirm the conviction and the sentence.

Michael LINDSEY

v.

STATE.

1 Div. 465.

Court of Criminal Appeals of Alabama.

Nov. 1, 1980.

Rehearing Denied Nov. 25, 1980.

Defendant was convicted in the Circuit Court, Mobile County, Braxton L. Kittrell, Jr., J., of capital murder, and he appealed. The Court of Criminal Appeals, Tyson, J.,

was not raised in original brief, this is no bar to our consideration of the question.

Moreover, it being the duty of this court to ensure that justice is served and fundamental rights are not indiscriminately denied, I conclude that Dennis Dumas did not receive a fair trial.

For the reasons stated, I would overrule the application for rehearing.

FAULKNER, JONES and ADAMS, JJ., concur.

Arthur JONES

v.

STATE.

1 Div. 377.

Court of Criminal Appeals of Alabama.

Aug. 16, 1985.

Rehearing Denied Oct. 4, 1985.

Defendant was convicted in the Circuit Court, Baldwin County, Harry J. Wilters, Jr., J., of murder during a robbery in the first degree or an attempt thereof committed by the defendant, and he appealed. The Court of Criminal Appeals, Hubert Taylor, J., held that: (1) prosecutor properly commented upon items which, although not introduced into evidence, were treated by both parties as evidence in the presence of the jury; (2) defendant was properly informed of his right to presence of attorney during questioning and offer of an appointed attorney was not improperly associated with a future time in court; (3) trial court properly rejected jury's advisory sentence of life without parole and elevated defendant's sentence to death; (4) prosecutor's misstatement of pertinent fact not in evidence was not prejudicial; (5) sentence of death was not imposed under influence of passion, prejudice, or any other arbitrary factor; (6) evidence was sufficient to support finding that no mitigating circumstances existed and that three aggravating circumstances existed; and (7) sentence of death was not excessive or disproportionate as applied to defendant, in that death penalty was being imposed in similar cases.

Affirmed.

Judgment affirmed, Ala., 456 So.2d 380.

1. Criminal Law ⇐720(1)

Prosecutor properly commented upon said items reasonable inferences from items which, although not formally introduced into evidence, were evidence in the case, in that both parties treated the items as evidence in presence of the jury.

2. Criminal Law ⇐412.2(3)

Miranda requires no talismanic formulation of warnings to be given to a criminal defendant as to the constitutional rights protected by that decision. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐412.2(3)

Miranda warnings given to defendant properly informed him of his right to the presence of an attorney during questioning and did not improperly associate offer of an appointed attorney with a future time in court. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐824

Trial court properly rejected jury's advisory sentence of life without parole and elevated defendant's sentence to death.

5. Criminal Law ⇐719(1)

While counsel should have wide latitude in arguing reasonable inferences from the evidence, counsel should not be allowed to argue as a fact that which is not supported by the evidence presented during trial.

6. Criminal Law ⇐1171.2

When a prosecutor asserts a fact not in evidence, which is prejudicial to the accused, error occurs; however, not every

argument of a fact not in evidence is so prejudicial as to necessarily affect the substantial rights of the defendant.

7. Criminal Law ⇐1171.2

In order for unsupported prosecutorial statements of fact to require reversal, the objectionable statements must be made as of fact, without support by any evidence, must be pertinent to the issues, and must have a natural tendency to influence the finding of the jury.

8. Criminal Law ⇐1171.2

In prosecution for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant, prosecutor's misstatement that expert had testified that glue found on pocketknife in possession of defendant matched that used by victim in model hobby, through an improper statement of a pertinent fact not in evidence, was not without support by any evidence and did not have a natural tendency to influence jury against defendant so as to prejudicially affect substantial rights of defendant and deny him a fair trial. Code 1975, § 13A-5-40(a)(2).

9. Homicide ⇐354

In prosecution for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant, there was no evidence that the trial judge imposed sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Code 1975, §§ 13A-5-40(a)(2), 13A-5-53(a, b).

10. Homicide ⇐354

In prosecution for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant, evidence was sufficient to support finding that no mitigating circumstances existed, statutory or otherwise, in defendant's favor. Code 1975, §§ 13A-5-49(a)(2), 13A-5-53(a, b).

11. Homicide ⇐354

In prosecution for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant, death penalty was proper, given gravity of aggravating circumstances and total lack of mitigating circumstances. Code 1975, §§ 13A-5-40(a)(2), 13A-5-53(a, b).

12. Criminal Law ⇐1206.2(7)

Homicide ⇐354

In prosecution for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant, sentence of death was not excessive or disproportionate as applied to defendant, in that the death penalty was being imposed in similar cases. Code 1975, §§ 13A-5-40(a)(2), 13A-5-53(a, b).

Julian B. Brackin, Jr. and W. Donald Bolton, Jr. of Foster, Brackin & Bolton, Foley, for appellant.

Charles A. Graddick, Atty. Gen., and Edward Carnes and Martha Gail Ingram, Asst. Attys. Gen., for appellee.

HUBERT TAYLOR, Judge.

Appellant was indicted and convicted under § 13A-5-40(a)(2), Code of Alabama 1975, for murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant. After a separate hearing on aggravating and mitigating circumstances, the jury fixed appellant's punishment at life imprisonment without parole. Subsequently the trial judge weighed the aggravating and mit-

gating circumstances pursuant to § 13A-5-47, Code of Alabama 1975, and finding no mitigating circumstances, rejected the jury's advisory verdict and fixed appellant's punishment at death. The court entered specific findings of fact which set forth the aggravating circumstances which the court found sufficient to indicate that death was the appropriate punishment.

Because this is a conviction of a capital offense resulting in a sentence of death, we will detail the crucial facts presented at trial.

Mr. Robert D. Mitchell testified that in September of 1981, he lived in a mobile home next door to The Outdoorsman store. His trailer was located approximately forty-five yards north of the store. The residence of Mr. Bobby Thompson was situated on the same side of the road, about eighty yards north of Mr. Mitchell's mobile home. Both his trailer and The Outdoorsman faced Highway 225, with the front of Mr. Mitchell's trailer sitting approximately one hundred feet closer to the highway than the front of the store. There are no woods between his trailer and The Outdoorsman.

Mr. Mitchell testified he was at his trailer preparing for bed around 8:30 p.m. on September 14, 1981, when he heard five gunshots. At that moment he was in his bedroom on the south end of his trailer. He was able to look directly out that window and see The Outdoorsman store, where he saw a man crouched down by the north side of the store. He watched as the man ran out front into the light, returned and crouched down again, and then moved slowly toward the end of the building and ran south.

The man Mr. Mitchell observed wore a white tee-shirt and dark pants. He was a black male, approximately five feet six inches in height and 140 pounds in weight.

As the man came out into the light the second time, he was carrying a brown paper sack in his left hand. In his right hand he held a plastic garbage bag. Mr. Mitchell grabbed his gun and drove to the store, arriving just after Mr. Bobby Thompson. When he arrived, he saw the victim, Vaughn Thompson, lying face down on the ground with a gunshot wound to the head.

Mr. Bobby Thompson instructed Mr. Mitchell to remain with Mrs. Elma Thompson, and then took Mr. Mitchell's gun and left in his automobile in the direction Mitchell saw the man leave.

Mr. Bobby Thompson testified he lived on Highway 225, approximately 300 yards north of a store he owned called The Outdoorsman. He stated he was the father of the victim, Vaughn Thompson.

On September 14, 1981, around 8:30 p.m. he was in his living room when his wife ran to the door and told him she thought she heard shots from the direction of the store. As they ran to their automobile, they heard three more shots from the direction of the store. They drove to the store and while still a hundred and fifty yards from the store they saw a short black man wearing a tee-shirt run out of the store. Mr. Thompson estimated the man's weight at 135 to 140 pounds.

When the Thompsons arrived at the store, Mr. Thompson saw his son, Vaughn, lying face down in the driveway. He jumped from the automobile and held and called to his son, but received no response. He then took Mr. Mitchell's shotgun, got into his automobile and drove in the direction Mr. Mitchell saw the man run towards. He traveled only approximately fifty yards south when he saw an automobile on a dirt side-road traveling very slowly. Mr. Thompson increased his speed, but the other vehicle eluded him after three or four miles.

Although Mr. Thompson could not identify appellant as the man he observed at the store, he did recall the appellant coming into the store approximately four or five days before his son was murdered.

Mr. Thompson testified that shortly before the time of his son's death, Vaughn had been building a log cabin from match sticks which he glued together into a hexagon flat. He had observed his son using a knife to raise up the matches with the glue on them in building the cabin. The

knife, which Thompson stated he had seen his son use approximately forty times, was positively identified by Thompson as State's exhibit number four. He last remembered seeing the knife approximately two days before his son's death.

The victim's mother, Mrs. Elma Thompson, testified and verified her husband's testimony. She also testified that she had prepared her son's lunch earlier that day and stored it in Tupperware bowls. She had given the bowls to him that morning. Mrs. Thompson stated she was walking along Highway 225 on the side on which the store was located with several people on the morning of September 15, 1981, when her son-in-law discovered the bowls and gave them to her. She in turn gave the items to law enforcement officer Woodrow Overbey. She identified the bowls as State's exhibit six.

Robert Stewart testified he was the chief criminal investigator for Baldwin County on September 14, 1981, and that he was called upon to investigate the death of Vaughn Thompson on that date. Upon arriving at the scene he observed the victim's body lying in front of The Outdoorsman. Officer Stewart stated a bloodhound used in the investigation ran a trail from the body, around the building, over to a dirt road, and then down the dirt road to a location where a vehicle had been parked. In this area a garbage bag was observed by a Lieutenant McDowell. Officer Stewart took the bag into his possession, delivering some of its contents to the lab, and retaining other parts for use by the department in the investigation.

Officer Stewart testified he removed from the bag several check stubs and an envelope with the address 311 Montgomery Street. The appellant's name appeared on the check stubs, although one was printed as Arthur Jones Junior and the others only as Arthur Jones. Officer Stewart also retained a bandage which had strands of hair attached to it and a receipt from a Delchamps market dated September 10.

On September 18, 1981, Officer Stewart went to the 311 Montgomery Street address in Mobile, Alabama. There he arrived at that address he found the appellant sitting at a kitchen table with Detective Pickett. He identified himself to the appellant, and told him he was there to investigate a robbery-homicide. He advised appellant of his Miranda rights, and appellant agreed to talk with him. Officer Stewart recalled that at some point during this initial phase of his interrogation of appellant that appellant was cleaning his fingernails with a pocketknife.

Appellant stated that he had been at home, alone, on the evening of September 14 watching a ballgame on television. During the halftime of the ballgame, he left his apartment to get some ice cream. He did not recall having been in Baldwin County for several months prior to the interrogation by Officer Stewart.

Appellant was asked how long it had been since he had thrown garbage away and he stated it had been two weeks. When he was told that a bag of garbage containing some of his effects had been found, he recalled having dropped a bag of garbage in a trash drop at a Shell gas station during the ballgame halftime.

Appellant stated he had loaned his vehicle, described by Officer Stewart as a blue and white 1976 or 1977 Grand Prix Pontiac, to only one man. That occurred only seven, three weeks prior to the interrogation.

Prior to the time frame of the crime ever having been mentioned to appellant, he volunteered the following statement to Officer Stewart:

"Prior to his arrest, while we were still in the kitchen at his apartment talking to Mr. Jones, he just, out of the open air, says, 'Well, y'all are trying to put me over there at 9 o'clock when that murder happened and I wasn't there. I was here in this apartment.'"

Following the interrogation of appellant at his residence, Officer Stewart placed appellant under arrest. During a search of appellant's person pursuant to the arrest, Officer Stewart removed a small pocketknife which he later delivered to the crime

lab. Stewart identified State's exhibit four as being the same knife he had removed from appellant during the search.

On cross-examination, Officer Stewart stated that a knit pullover cap that had holes for eyes cut out in it, so as to resemble a ski mask, was also found on the dirt road approximately twenty feet from where the vehicle had been parked.

Roland Howell, an investigator for the Baldwin County Sheriff's Department, stated he was present when the bag of garbage was found. He observed the name on the return address of an envelope found therein and stated the return was addressed to Abdul Sabir Shakur at 311 Montgomery Street.

Terry J. Malone testified he was the president of Industrial Services. He identified the check pay-stubs found in the garbage bag as having been issued by his company, and identified appellant as the recipient of those checks.

James L. Small, a laboratory administrator for the Department of Forensic Sciences, examined photographs of appellant's tires and of impressions made of the tracks found on the dirt road. He stated the tracks were of the same design, and that the tire in the photograph could have made the tracks in the impression. His examination of a bandage obtained from the garbage bag found on the dirt road indicated the presence of hairs from someone of the Negro race. He also examined State's exhibit four, the pocketknife, and found adhered to it the substance cyanoacrylate, commonly known as super glue.

Mark Evans testified he was employed on the three to eleven p.m. shift at the Hess Oil Company service station on the corner of Springhill and Broad in Mobile, Alabama, on September 14, 1981. He recalled seeing the appellant come in and get gas sometime after 9 p.m. that evening. He did not see appellant place any trash in the station's dumpster. It would have been possible for someone to place trash in the dump without his knowledge, however, because he did not have a full view of it from where he worked.

Larry Shakir, a friend of appellant, testified he received a pistol from appellant on the morning of September 15. He had previously requested that appellant find him a weapon for his personal use and protection. Upon learning of the murder and of appellant's possible involvement from a news report the following morning, Mr. Shakir "panicked" and threw the gun into Mobile Bay. He did not recall the make or caliber of the gun.

Mr. Shakir also testified that at one point in time, appellant had changed his name to the Muslim name of Beagee. Because the name was Arabic, he was not sure of its pronunciation.

On examination by defense counsel, Mr. Shakir identified State's exhibit four as a knife which belonged to appellant. However, upon further examination by the State, he admitted having earlier identified another knife as the one which appellant owned. He could not say which, if either, of the knives ever belonged to appellant, but only that they were similar to appellant's knife.

Curtis Lassiter, the victim's brother-in-law, testified he found a brown grocery bag containing Tupperware on the morning after the victim was murdered. He located the bag approximately one hundred and twenty-five yards south of The Outdoorsman on the right hand side of the road. The bag was about half way between the store and the nearby dirt road. When he saw the sack it was sitting flat on the ground and the top was open. He took the bag to the store and gave it to Mrs. Thompson.

Dr. Leroy Riddick, a State forensic pathologist, testified he determined the victim's death was caused by injuries to the brain resulting from three gunshot wounds to the head and neck. The body also evidenced blunt force trauma, which indicated the victim had been struck with an object.

Bobby Stewart was recalled by the State and testified appellant told him during the conversation at appellant's house that he

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Mr. Bobby Thompson took the stand again and testified that after the robbery a bag containing four hundred dollars was found, as well as two hundred dollars in the cash register. Because it was time to buy gasoline and beer for the store, which were purchased in cash, there should have been approximately a thousand dollars in cash at the store. He had not seen the money, but had been told by his son that it was available in the store for those purchases.

Roland Howell retook the stand and testified The Outdoorsman was located in Baldwin County, Alabama. The State rested at the close of his testimony.

Appellant moved to dismiss the State's case for failure to establish a prima facie case in that the State failed to prove a robbery occurred. The trial court denied appellant's motion.

Arenas Thigpen, called by appellant to testify, stated he was a friend of appellant. He recalled having twice borrowed appellant's automobile, once on a Sunday and once on a Tuesday. He denied any connection with the shooting in Baldwin County, and stated he had not been in Baldwin County within the last year.

Appellant rested at the close of Thigpen's testimony. The State presented no rebuttal, and appellant's motion to exclude the State's evidence and for a directed verdict was denied.

I

Appellant contends that reversible error occurred when the prosecutor commented on evidence which had not been formally admitted at trial while making his closing argument to the jury. The items in question, State's exhibit number six, are the Tupperware bowls and the brown paper grocery bag which contained them, which were found near the bag of garbage at the crime scene. The record reflects the following identification was made during the testimony of the victim's mother:

"Q Mrs. Thompson, I will ask you to look into the bag that's been marked for identification as State's Exhibit Number Six. . . will ask you if you can recognize the items inside the bag which have been marked for identification.

". . . .

"Q I asked you to look at what's been marked for identification as State's Exhibit Six. Do you recognize that item?

"A Yes, I do.

"Q Could you tell the ladies and gentlemen of the Jury what that item is?

"A It's the bowls, Tupperware bowls that I gave my son his lunch and breakfast in that morning, September 14th.

"Q After September 14th, when was the next time you saw that item?

"A The next morning, September the 15th.

"Q And where did that item come from?

"A It was found.

"Q Where?

"A On the road below the store.

". . . .

"Q And was that item found—on what side of the road, what side of 225?

"A On the same side as the store.

"Q Were you with the people that found the item?

"A Yes, I was. We were all walking.

"Q Who was that?

"A My son-in-law.

"Q Who was it given to?

"A Me.

"Q And after you had it, who did you give it to?

"A I think Mr. Woodrow Overbey, one of the law enforcement officers. I'm almost certain it was Woodrow Overbey."

Later in the trial, Curtis Lassiter, the victim's brother-in-law, testified he found a brown grocery bag containing Tupperware on the morning following the murder. He took the bag, which he found on the ground between The Outdoorsman and the dirt road, and gave it to Mrs. Thompson.

During the presentation of the appellant's case, appellant conducted the following examination of appellant's witness Arenzo Thigpen:

"Q I'm going to show you a bag marked as State's Exhibit Six and ask you to look inside of there.

"A Okay.

"MR. WILKINS: Go ahead, you can look.

"THE WITNESS: (Witness reviewing instruments and documents.) What are we looking for?

"BY MR. ENFINGER:

"Q Did you look at the items in the bag?

"A Not really. Let me check it out again. I really don't know what I am supposed to be looking for.

"Q Have you ever seen those items before?

"A Not as I know of. I seen a lot of items that look like that. It's Tupperware. Most housewives have them. I don't know whether I seen them before or not."

[1] Although the record does not indicate that the Tupperware and grocery bag were formally introduced into evidence, they were marked for identification, identified by a State's witness, displayed before the jury, and commented upon by several witnesses. The articles were, therefore, evidence in the case. *Hope v. State*, 378 So.2d 745 (Ala.Cr.App.), *cert. denied*, 378 So.2d 747 (Ala.1979); *Simpson v. State*, 51 Ala.App. 273, 284 So.2d 734 (1973). As such, the articles were proper subjects for the prosecutor to comment upon and draw reasonable inferences from during his closing argument. *Hope*, supra.

The articles were repeatedly referred to by the prosecutor and appellant's counsel during their examinations of various witnesses. As indicated above, appellant's counsel questioned his own witness on direct examination concerning the articles. Both parties having treated the articles as evidence in the presence of the jury, there is no error. *Golston v. State*, 371 So.2d 471 (Ala.Cr.App.1979).

Moreover, our review of the record indicates that it was appellant's own counsel who first commented upon the articles during closing arguments, as follows:

"Nonetheless, he was going back and forth there, the short black man, you know, even though the vision was so good to say it was a short black man and had on a t-shirt and low and behold, here he is carrying this paper bag, and I believe, it was this paper bag.

"Ladies and gentlemen, there is no doubt about it. That's just reasonable. This paper bag, and then, some kind of dark plastic bag, garbage bag.

"....

"No question that the Tupperware was found out there. No question about that whoever was running away from that store was carrying that Tupperware.

"....

"But let's clear away the smoke screen that the DA has tried to put in here about the garbage and the glue on the knife. The knife, the Tupperware, and all of that other stuff."

We fail to see, therefore, how appellant could have been harmed by the prosecutor's similar reference to the articles during his subsequent closing argument.

II

Appellant contends the wording of the warning he received prior to making a statement to police was insufficient to advise him of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Hence, he argues his statements were inadmissible at trial.

Officer Robert Stewart testified he advised appellant of his constitutional rights in the following manner prior to interrogating him at his home on September 16, 1981:

"Q Now, what is that card, if you will?

"A It's a warning of constitutional rights and a waiver.

"Q And how did you use that card to advise you?

"A I used it in reading the Defendant his constitutional rights.

"Q And would you read to this Jury the rights that you read to the Defendant at that time?

"A Yes, sir. 'You have the right to talk to a lawyer, have him with you while you are being questioned, if you want a lawyer but cannot afford one, the Court will appoint one for you.

"'You have the right to remain silent, anything you say can and will be used against you in a Court of law.'

"Q All right, sir. Where were you when this was done?

"A Seated at the kitchen table.

"Q Who else was seated at the table?

"A Mr. Jones and Detective Pickett and Roland Howell; but I also went one step farther and advised him that should he decide to talk to us and any time during that conversation that he wished to, he could stop talking and request an attorney at any time."

Officer Wayne Ivie testified that he also read appellant his constitutional rights, shortly before Officer Stewart arrived at appellant's home on September 16, 1981. Officer Ivie testified he instructed appellant as follows:

"A Yes, sir. I advised him that he had the right to remain silent and anything that he said could and would be used against him in a Court of law, that he had the right to have an attorney present, and if he couldn't afford an attorney, one would be appointed for him. And at any time during the questioning, if he so desired, the questioning would be stopped. I asked Mr. Jones if he understood the rights and he replied that he did.

"Q Was anyone else present at the time?

"A Sergeant Pickett."

Officer Walter Pickett testified he was present and heard both Officer Stewart and Officer Ivie advise appellant of his constitutional rights.

Appellant, citing an annotation which follows the *Miranda* decision at 16 L.Ed.2d 1294, contends the warnings appellant received were insufficient in particular because they failed to use the precise language as formulated in the annotation, which states that a suspect "has the right to consult with, and have present prior to and during interrogation, an attorney either retained or appointed ...." 16 L.Ed.2d 1300. (Emphasis added.) Appellant's argument has specific reference to the officer's failure to use the term "prior to" in warning appellant of his right to counsel.

[2, 3] The *Miranda* decision requires no talismanic formulation of the warnings to be given to a criminal defendant as to the constitutional rights protected by that decision. *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Reviewing the language used to inform the appellant herein of his right to appointed counsel, we find, as did the court in *Prysock*, supra, that "[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning ... or in which the offer of an appointed attorney was associated with a future time in court...." *Prysock*, supra, at 361, 101 S.Ct. at 2810. (Citations omitted.) There was no error in this regard.

III

[4] Appellant asserts the trial court's action in rejecting the advisory sentence of life without parole recommended by the jury, in order to elevate his sentence to death, was error. Appellant's arguments have been precluded, however, by our recent decision in *Murray v. State*, 455 So.2d 58 (Ala.Cr.App.1983). There was no impropriety in the trial judge's decision to sentence appellant to death.

IV

During the State's closing argument, the following appears in reference to the knife found on appellant's person at the time of his arrest:

"Vaughn Thompson's father identified that item for you. And that time, when Arthur Jones was placed under arrest, this item of evidence was found in Arthur Jones' pocket. This item of evidence had the glue on it that that young Thompson boy was making his little model hobby with. And this item, this item came out of Vaughn Thompson's pocket and wound up in the Defendant's pocket. That's what the lab man said. He said the glue on that knife was consistent with the type of glue that was found that Vaughn Thompson had been using at the store.

"MR. ENFINGER: Judge, we're going to object to the prior remark made by the Prosecutor on the basis that there was no testimony from any State's witness that that glue that was found on the blade of the knife was found at the scene of the crime.

"THE COURT: Ladies and gentlemen of the Jury, let me instruct you at this time that you are only to consider the evidence that you have heard from the witness stand and only what your recollection of what that evidence is and not what the attorneys are saying to you. They are only arguing the case to you as to how they remember it and how they recollect it. The facts as they best remember is what they are trying to portray. They are gathering their reasonable inference therefrom, as you consider only what comes from the witness stand as you remember it."

Appellant argues that the prosecutor's remark misstated the testimony and stated a fact which was not supported by the evidence, thus creating reversible error. The State on appeal does not deny that there was never any evidence presented that the laboratory expert stated the glue used on the cabin model, nor any glue samples taken from the victim's possession at the scene of the crime, were of the same glue type as that found on the knife.

In the State's closing argument in rebuttal, erroneous reference was again made to the laboratory expert's testimony, as appears below:

"And I want you to look at that knife when you get it back there in that Jury Room. You look at that knife very closely. You look up under this thing and you look at it and you see what that substance is that's on the knife. Mr. Small told you from the lab that it was a kind of whatever type glue he said. It was the same type glue used in the model, a Superglue."

The testimony of the laboratory expert, Mr. James Small, indicated his tests revealed that the material on the knife was a glue of the cyanoacrylate group. He also stated that four samples of glue he received from Officer Roland Howell were of the same cyanoacrylate group as the glue on the knife. However, there was no testimony by Mr. Small, Officer Howell, or anyone else as to the origin of the glue samples obtained by the officer which were compared with the glue on the knife.

Mr. Small also testified that he received a "model," a bottle labeled as Elmer's glue, and a jar lid containing glue from Officer Stewart. There was no testimony, however, that any of those items contained glue of the cyanoacrylate group.

[3, 4] While counsel should have wide latitude in arguing reasonable inferences from the evidence, counsel should not be allowed to argue as a fact that which is not supported by the evidence presented during trial. *Brown v. State*, 374 So.2d 391 (Ala.Cr.App.), *affirmed*, 374 So.2d 395 (Ala.1979). It is without question that the prosecutorial arguments quoted above were factual misstatements of Mr. Small's testimony which fall within this prohibition. When the prosecutor asserts a fact not in evidence, which is prejudicial to the accused, error occurs. *Diamond v. State*, 363 So.2d 109 (Ala.Cr.App.1978). However, not every argument of a fact not in evidence is so prejudicial as to necessarily affect the substantial rights of the defendant. See, *Brown*, supra at 396; *Flint v. State*, 370 So.2d 332 (Ala.Cr.App.1979).

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...d you to look at that knife ...et it back there in that Jury ... look at that knife very close... k up under this thing and you ...ind you see what that sub...ce is that's on the knife. Mr. Small ...old you from the lab that it was a kind ...n the lab that it was a kind ... type glue he said. It was ...pe glue used in the model, a

...ry of the laboratory expert, ...Small, indicated his tests re... material on the knife was a ...yanocrylate group. He also ...ur samples of glue he re... Officer Roland Howell were of ...noacrylate group as the glue ... However, there was no testi... Small, Officer Howell, or any... the origin of the glue sam... by the officer which were ... the glue on the knife.

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[7] In order for unsupported prosecutorial statements of fact to require reversal, the objectionable statements must be (1) made as of fact, (2) without support by any evidence, (3) pertinent to the issues, and (4) have a natural tendency to influence the finding of the jury. *Tillman v. State*, 374 So.2d 922 (Ala.Cr.App.1978), *cert. quashed*, 374 So.2d 926, 927 (Ala.1979); *Flint*, supra.

The prosecutorial statements in question clearly violated factors (1) and (3) above. The prosecutor's argument was phrased as a statement of fact, and not as an inference from the facts. The knife's connection to the victim by the presence of the same type of glue as used in the victim's cabin model was clearly pertinent in proving the State's entirely circumstantial case.

As to factor (2), we cannot say that the prosecutor's argument was entirely unsupported by any evidence at trial. The scientific expert did testify that the glue on the knife and certain glue samples from the officers investigating the case were of the same chemical group. The prosecutor may have argued as a legitimate inference from the testimony that a knife which was both identified by the victim's father and which bore evidence of glue must have been the victim's knife. Yet, there still was no basis for his statement that the expert actually identified the glue samples from the crime scene as the same type as the glue on the knife.

We look finally, and crucially, then, at factor (4) to determine whether the natural tendency of the misstatement of the expert's testimony was to influence the finding of the jury against appellant's interests.

The State's case against appellant, while entirely circumstantial, was in no wise dependent upon the expert's testimony on the identity of the glue type to establish an overwhelming case against appellant. Eye witnesses described the assailant's race, height and weight, although they were unable to identify him because of the distance from which they viewed him. One witness could see that the assailant carried a brown paper sack and a plastic garbage bag. The victim's father observed an automobile on a nearby dirt road which was located in the direction he had seen the assailant flee. He gave chase, but eventually lost the automobile. The victim's father also positively identified the knife found in appellant's possession as the one his son had owned.

Bloodhounds brought to the murder scene tracked a trail directly to the dirt road where an automobile had been parked. In this area, a bag of garbage containing check stubs with appellant's name, an envelope with appellant's return address, and a bandage with strands of hair of Negro origin were found. Between the store and the dirt road, a brown paper sack containing Tupperware from the victim's lunch was found.

When police arrived to investigate appellant, they found in his possession a knife later identified by the victim's father as belonging to the victim. When questioned about discarding garbage, appellant changed his story about not disposing of any refuse, upon learning garbage had been found which was connected to him. Appellant admitted having recently cut his finger, but denied being in Baldwin County. His story about discarding the garbage at the Hess station was refuted by police investigation of the station attendant. Finally, without having been told of the time frame of the crime, appellant volunteered a denial of having been at the crime scene at the very time the crime was committed.

Laboratory expert Small testified a tire print taken from the dirt road was of the same design as the tread of the tires on appellant's automobile. And while the expert never connected the glue on the knife with the glue from the crime scene, he did find that glue was present on the knife. The victim's father had earlier testified that his son used his knife in gluing match sticks on a model of a cabin. Thus the identification of the glue would only be cumulative evidence of the identification of the knife previously made by the victim's father.

A friend of appellant's testified to having received a gun from appellant on the morning following the murder, which he later disposed of because he feared it was connected to the murder.

[8] In light of the entirety of the circumstantial evidence against appellant, we do not view the prosecutor's misstatement in question as having a natural tendency to influence the jury against appellant so as to have denied appellant of a fair trial. *Floyd*, supra. We find this to be a case where the evidence as to the identity of appellant was so overwhelmingly in favor of the State that it is inconceivable that a reasonable jury would have returned a verdict of not guilty. See *Brown*, supra. The argument of a fact not in evidence was not so prejudicial as to have necessarily affected the substantial rights of appellant. See, *Brown*, supra, at 396.

We are influenced too by the fact that the trial court did not overrule appellant's objection, but rather immediately proceeded to instruct the jury as quoted supra. Appellant did not further pursue his objection, which may be taken to indicate he found the judge's instruction sufficient at that time to cure any misapprehension by the jury. As well, appellant's counsel stated the following to the jury in closing argument which followed the prosecutor's initial statement:

"Now, a pocketknife, I guess a lot of gentlemen have pocketknives; but using pocketknives, they use them on all kinds of things. So many things, you can use them for so many things but you remember when I kept asking that man about the different qualities of that glue and could it have been any other type of glue and don't all these types of other glues have certain kinds of qualities. And you know, there was never any glue introduced that where the DA brought it in and said, look, this was the glue that the young Thompson fellow used working with his model and used working with his knife. Now, did you run tests on that specific glue? Did they? That was never mentioned."

Finally, the trial court instructed the jury during its oral charge as appears below:

"The statements or assertions of counsel are not evidence in the case. You take the testimony of the witnesses together with all proper and reasonable inferences therefrom, apply your common sense, and in an honest and impartial way, you determine what you believe to be the truth."

In light of these actions, we do not believe the prosecutor's statement created reversible error. *See, Weaver v. State*, 402 So.2d 1099 (Ala.Cr.App.1981); *Mendrich v. State*, 370 So.2d 1073 (Ala.Cr.App.), cert. denied, 370 So.2d 1079 (1979).

V

Reviewing this case in light of § 13A-5-53(a), Code of Alabama 1975, we find that:

(1) there was no error adversely affecting the rights of the appellant made in the sentencing hearing;

(2) the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence [1];

(3) that death was the proper sentence in this case.

[9,10] In determining the propriety of the sentence of death, we have determined in accordance with § 13A-5-53(b), Code of Alabama 1975, that the record indicates no evidence that the trial judge imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Our independent weighing of the aggravating and mitigating circumstances evidenced by the record places us in accord with the trial judge's decision to fix appellant's punishment at death. We find, as did the trial judge, no evidence that any mitigating circumstances existed, statutory or otherwise, in appellant's favor. We

1. The trial court's findings of fact, setting forth its findings as to aggravating and mitigating circumstances, are attached as Appendix A.

agree with the trial court's finding of the three aggravating circumstances.

[11] The record indicates the crime was committed while appellant was under sentence of imprisonment, although he was serving the latter part of this sentence while on parole. Also sustained by the record is the trial court's finding that appellant was previously convicted of another felony involving the use or threat of violence to the person. Finally, the evidence presented at trial supports the trial judge's finding that the capital offense was committed while the appellant was engaged in the commission of a robbery.

[12] Weighing the gravity of the aggravating circumstances against the total lack of mitigating circumstances, we are of the opinion that the death penalty is the proper sentence in this case.

[13] Our review assures us that the death penalty is being imposed in similar cases, and therefore the sentence of death is not excessive or disproportionate as applied to the appellant in this case. *See Watkins v. State*, [Ms. 6 Div. 925, July 5, 1983] (Ala.Cr.App.1983); *Ritzman v. State*, 429 So.2d 1104 (Ala.Cr.App.), *aff'd*, 429 So.2d 1121 (Ala.1982).

No error prejudicial to the substantial rights of appellant having been found, this case is affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA, Plaintiff,

VS.

ARTHUR JONES a/k/a ARTHUR JONES, JR., Defendant.

CASE NO: CC 81-410

SUMMARY OF FINDING OF FACTS FROM THE TRIAL

On September 14, 1981, several witnesses heard gun shots being fired at the Outdoorsman Store located on Alabama Highway 225 where Baldwin County Road 40 intersects said highway in Baldwin County, Alabama. Two of the witnesses gave a general description of the individual leaving the said store carrying in each hand a bag. One of the bags was identified as a brown paper bag. The description met the general description of the Defendant. This person proceeded from the store and went in a southerly direction to an infrequently used dirt road. A short time after this a car sped out of the said dirt road on Highway 225 and went in a southerly direction at a high rate of speed towards the Mobile Bay Causeway. Approximately one-half the distance between the Outdoorsman Store and from the point which the said vehicle left, was found a brown paper bag containing tupperware which the victim's mother identified his noon lunch had been in. At a point where the car sped away, was found a garbage bag which contained check stubs and envelopes on which was written the Defendant's name and address. The Defendant stated he had not been in Baldwin County in six or seven weeks. Bloodhounds traced a path which matched the movements of the person described by the witnesses to a point where the garbage was found and the car sped away. There was also found there in the garbage a bandage.

Photographs were made of the tire tracks on this road which was testified to by a State Toxicologist as being similar to those tires found on the Defendant's vehicle. The State Toxicologist also testified that there were hairs on the bandage which could be positively identified as those of a black person, Defendant being of the black race.

When the Defendant was being interrogated by a Baldwin County Investigator, the Defendant said that they wouldn't put him in Baldwin County at the Outdoorsman Store at 9:00 p.m. of the night of the shooting. When asked how he knew what time the shooting occurred, he became nervous

APPENDIX A—Continued

and upset and had no explanation. The Defendant also told the officers that he had a cut and had thrown the bandage which he had placed on it in his garbage. When first questioned by the investigators concerning garbage, the Defendant said that he had had no garbage for approximately ten days to two weeks. On being informed that a sack of garbage with the items as mentioned above was found near the scene of the crime, the Defendant changed his story and he told them that he had a few days prior to that time taken his garbage to a Hess Service Station and was directed by the attendant where to deposit it. The Defendant identified the attendant at the station to the investigators and the attendant at trial denied having directed the Defendant where to deposit his garbage. The Defendant denied to the investigators that he had a pistol, but a witness testified that the day following the robbery that the Defendant gave him a pistol. A day or so later when the witness heard that the Defendant had been charged with the murder of Vaughn Thompson, he became frightened and drove to the Mobile Bay Highway and threw the pistol in the bay.

At the time that the Defendant was arrested, a knife was found on the Defendant which the victim's father identified as belonging to the victim. There was residue on the knife which the State Toxicologist identified as being a similar substance.

The jury concluded beyond a reasonable doubt from this and other evidence that the Defendant was guilty of the Capital Offense of Robbery Murder as charged in the indictment. The Court concurred in their verdict.

SENTENCING HEARING BY THE COURT

The Court having conducted a hearing pursuant to Title 13A-5-47 of the Code of Alabama, 1975 as amended to determine whether or not the Court will sentence Arthur Jones a/k/a Arthur Jones, Jr. to death or to life imprisonment without parole and the Court having considered the evidence presented at the trial and at the sentencing hearing before the jury and the hearing conducted before the Court along with the pre-sentence investigation report which has been made part of this record, the Court makes the following determination.

AGGRAVATING CIRCUMSTANCES

The Court first considers the aggravating circumstances as outlined and described in Title 13A-5-49; Code of Alabama:

(1) The Court finds that the capital offense was committed by Arthur Jones a/k/a Arthur Jones, Jr. while he was under sentence of imprisonment, although he was serving the latter part of his sentence on parole at the time;

(2) The Court finds that the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The Court finds that there is no evidence that the Defendant did knowingly create a great risk of death to many persons;

(4) The Court finds the capital offense was committed while the Defendant was engaged in the commission of a robbery;

(5) The Court finds the capital offense was not committed for the purpose of avoiding or preventing a lawful arrest effecting an escape from custody;

(6) The Court finds that the capital offense was not committed for pecuniary gain;

(7) The Court finds the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(8) The Court finds that the capital offense was not especially heinous, atrocious or cruel compared to other capital offenses;

The Court finds beyond a reasonable doubt that the aggravating circumstances described in Title 13A-5-49 and set out above in subparagraphs (1), (2) and (4) particularly apply to the Defendant Arthur Jones a/k/a Arthur Jones, Jr. in this case.

APPENDIX A—Continued

MITIGATING CIRCUMSTANCES

The Court now considers the mitigating circumstances as described and set out in Title 13A-5-51, Code of Alabama:

(1) The Court finds that the Defendant has a significant history of prior criminal activity;

(2) The Court finds that the capital offense was not committed while the Defendant was under the influence of extreme mental or emotional disturbance;

(3) The Court finds that the victim was not a participant in the Defendant's conduct or consented to it;

(4) The Court finds that the Defendant was not an accomplice in the capital offense committed, but was in fact the principal who robbed and intentionally killed the victim Vaughn Thompson;

(5) The Court finds that the Defendant did not act under extreme duress or under the substantial domination of another person;

(6) The Court does not find that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The Court finds that the age of the Defendant is not a mitigating circumstance.

CONCLUSION

The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing them, the Court is convinced beyond a reasonable doubt and to a moral certainty and it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty should be imposed.

The Court is fully aware of the great responsibility that is placed on the trial judge in cases of this magnitude. The Court struggled long and hard with the decision that it must make in this case, and in making the determination to override the decision of the jury's advisory sentence of life imprisonment without parole. The Court must follow the dictates of its own conscience.

The Court is not chastising or inferring that the jury was lax in their responsibility. The Court feels that it is its responsibility to follow the law as written, and that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and businesses.

The Court therefore, rejects the advisory sentence of the jury in this case.

It is therefore, considered and adjudged by the Court that Arthur Jones a/k/a Arthur Jones, Jr. is guilty of the capital offense charged in the indictment and that he intentionally killed Vaughn Thompson in the course of a robbery in the first degree.

Arthur Jones, do you have anything to say before the sentence of law is passed on you? The Defendant has nothing to say.

It is ORDERED, ADJUDGED and DECREED that you, Arthur Jones a/k/a Arthur Jones, Jr. suffer death by electrocution at any time before the hour of sunrise on the twentieth (20th) day of May, 1982 inside the walls of William C. Holman Unit of the Prison System at Atmore, Alabama in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is therefore, further ORDERED, ADJUDGED and DECREED by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in case of his death, disability or absence, his deputy or in the event of the death, disability or absence of both the Warden and his deputy, then the person designated Administrator by law for such purpose at any time before the hour of sunrise shall on the twentieth day of May, 1982 inside the walls of William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Arthur Jones, a/k/a Arthur Jones, Jr., a current of electricity of sufficient intensity to cause

APPENDIX A—Continued

his death and the continual application of such current through the body of the said Arthur Jones a/k/a Arthur Jones, Jr. until the said Arthur Jones a/k/a Arthur Jones, Jr. be dead, and may Almighty God have mercy on your soul.

ORDERED this 19th day of February, 1982.

/s/ Harry J. Wilters, Jr.
CIRCUIT JUDGE
Twenty-eighth Judicial Circuit
Baldwin County, Alabama

Ex parte Arthur JONES.

(Re Arthur Jones

v.

State).

83-85.

Supreme Court of Alabama.

June 8, 1984.

Rehearings Denied Aug. 24, 1984 and Sept. 17, 1984.

Defendant was convicted in the Circuit Court, Baldwin County, Harry J. Wilters, Jr., J., of murder during a robbery in the first degree or an attempt thereof committed by defendant, and he appealed. The Court of Criminal Appeals, 456 So.2d 366, affirmed. On grant of certiorari, the Supreme Court, Beatty, J., held that: (1) certain statements of prosecution at trial did not create reversible error; (2) it was proper for trial court to override jury's advisory verdict of life imprisonment and impose sentence of death; (3) although certain items which trial court mentioned in sentencing were not formally introduced into evidence, such articles were "evidence" in the case; (4) trial court did not err in finding that glue on knife found in defendant's possession was a substance "similar" to that used by victim in building minature log cabin; (5) trial court's findings concerning aggravating and mitigating circumstances were supported by evidence; and (6) death was a proper sentence.

Affirmed.

Jones, J., concurred in result and filed opinion.

1. **Homicide** ⇐354

In prosecution for murder during robbery in first degree or attempt thereof committed by defendant, it was proper for trial court to override jury's advisory verdict of life imprisonment and impose sentence of death. Code 1975, § 13A-5-47.

2. **Statutes** ⇐188

Where plain language is used, statute must be interpreted to mean exactly what it says.

3. **Criminal Law** ⇐885

United States Constitution does not require Supreme Court to adopt *Tedder* rule that, in order to sustain sentence of death following jury recommendation of life, facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Code 1975, § 13A-5-47.

4. **Criminal Law** ⇐986.1

Although certain items which trial court mentioned in sentencing were never formally introduced into evidence, the articles were "evidence" in case in which the items were marked for identification, identified by state's witness, displayed before jury, and commented upon by several witnesses.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Criminal Law** ⇐494

In murder prosecution, trial court did not err in finding that glue on knife found in defendant's possession was substance "similar" to that used by victim in building a minature log cabin, in view of testimony

No constitutional requirement of jury sentencing in capital cases. Beck v. State, 365 So. 2d 985 (Ala. Crim. App.), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

But defendant cannot waive jury trial. — The defendant cannot waive a jury trial, even with the consent of the trial court, he cannot by such a maneuver avoid the legal necessity for a jury to try the facts, find the defendant guilty or not guilty, and if found guilty to fix his punishment at death. Evans v. Britton, 639 F.2d 221 (5th Cir. 1981).

Under this article, the defendant cannot waive a jury trial, even with the consent of the prosecution and the consent of the trial court; he cannot by such a maneuver avoid the legal necessity for a jury to try the facts, find defendant guilty or not guilty, and if found guilty to fix his punishment at death. Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979).

Whether the accused pleads guilty or not guilty, or refuses or declines to plead, a jury must pass upon the question of the guilt or innocence of one indicted under this article, and a jury must fix defendant's punishment if he is found guilty. Neither the Constitution of the United States nor the Constitution of Alabama gives an accused the right to dispense with a jury trial. Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979).

And sentence not permissible without verdict of jury. — This article sets forth not only the only crimes for which one may be punished by death or by life imprisonment without parole, but also the only method by which either punishment may be lawfully imposed. Neither the death sentence nor a sentence to life imprisonment without parole is permissible, whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death. Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979).

No constitutional requirement of jury sentencing in capital cases. Beck v. State, 365 So. 2d 985 (Ala. Crim. App.), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1981).

Jury consideration of death sentence. — A capital jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Trial judge sentences defendant. — The task of sentencing a defendant to death or life imprisonment without parole must be done by the trial judge. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 995 (Ala. 1981).

The death penalty is not necessarily a disproportionate sentence for accomplice to a killing so as to violate the eighth and fourteenth amendments, where the involvement in the capital felony is not minor. Ritter v. State, 375 So. 2d 270 (Ala. 1979), vacated, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980), — U.S. —, 102 S. Ct. 376, 69 L. Ed. 2d 1036 (1981).

Fact that local district attorneys had discretion as to whether to try defendants under the Death Penalty Act furnished no basis for inferring that capital crimes will be prosecuted on an arbitrary and capricious basis. Beck v. State, 365 So. 2d 985 (Ala. Crim. App.), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1981).

Indictment sufficient to charge aggravated offense. — Indictment which alleged that victim was intentionally killed while defendant was engaged in robbing him, rather than alleging that defendant was engaged in robbery and, while robbing, the victim was intentionally killed, was sufficient to charge aggravated offense under death penalty statute. Evans v. State, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979), rev'd on remand, 403 So. 2d 158 (Ala. Crim. App. 1981).

§§ 13A-5-30 through 13A-5-38. Repealed by Acts 1981, No. 81-178, § 20, effective July 1, 1981.

Code commissioner's note. — Acts 1981, No. 81-178, p. 203, § 20, provides that the repeal of §§ 13A-5-30 through 13A-5-38 shall not affect the application of pre-existing law to conduct occurring before 12:01 a.m. on July 1, 1981.

§ 13A-5-39. Definitions.

As used in this article, these terms shall be defined as follows:

(1) CAPITAL OFFENSE. An offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article.

(2) DURING. The term as used in section 13A-5-40(a) means in the course of or in connection with the commission of, or in immediate flight from the commission of the underlying felony or attempt thereof.

(3) EXPLOSIVES AND EXPLOSION. The terms shall have the meanings provided in section 13A-7-40(2) and (3).

(4) BURDEN OF INTERJECTING THE ISSUE. Shall be defined as provided in section 13A-1-2(14).

(5) MURDER AND MURDER BY THE DEFENDANT. Shall be defined as provided in section 13A-5-40(b).

(6) PREVIOUSLY CONVICTED AND PRIOR CRIMINAL ACTIVITY. As used in sections 13A-5-49(2) and 13A-5-51(1), these terms refer to events occurring before the date of the sentence hearing.

(7) UNDER SENTENCE OF IMPRISONMENT. As used in section 13A-5-49(1), the term means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom while or after serving a term of imprisonment, other than unconditional release and freedom after expiration of the term of sentence. (Acts 1981, No. 81-178, p. 203, § 1.)

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant, or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard.

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, p. 203, § 2; Acts 1982, No. 82-567, p. 945, § 1.)

defendant guilty of one of the aggravated offenses, it fixes the punishment at death. However, it is the trial judge, who, at a separate hearing, determines whether or not the defendant is to suffer death or life imprisonment without parole. The verdict of the jury is advisory only. No sentence exists until the pronouncement by the trial judge at the conclusion of the sentence hearing. It is for this reason that the court cannot be said to be commuting a sentence of death imposed by the jury, but, in truth and in fact, it is sentencing the accused after a jury's finding of guilt. Clemons v. State, 370 So. 2d 708 (Ala. Crim. App. 1979), rev'd in part on other grounds, 370 So. 2d 723 (Ala. 1979), overruled on other grounds, Beck v. State, 396 So. 2d 645 (Ala. 1980).

§ 13A-5-41. Lesser included offenses.

Subject to the provisions of section 13A-1-9(b), the jury may find a defendant indicted for a crime defined in section 13A-5-40(a) not guilty of the capital offense but guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in section 13A-1-9(a), and when there is a rational basis for such a verdict, include but are not limited to, murder as defined in section 13A-6-2(a), and the accompanying other felony, if any, in the provision of section 13A-5-40(a) upon which the indictment is based. (Acts 1981, No. 81-178, p. 203, § 3; Acts 1982, No. 82-567, p. 945, § 1.)

Collateral references. — 23A C.J.S., Criminal Law, § 1406.
21 Am. Jur. 2d, Criminal Law, § 156.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

§ 13A-5-42. Guilty plea; burden of proof upon state; waiver; sentencing.

A defendant who is indicted for a capital offense may plead guilty to it, but the state must in any event prove the defendant's guilt of the capital offense beyond a reasonable doubt to a jury. The guilty plea may be considered in determining whether the state has met that burden of proof. The guilty plea shall have the effect of waiving all non-jurisdictional defects in the proceeding resulting in the conviction except the sufficiency of the evidence. A defendant convicted of a capital offense after pleading guilty to it shall be sentenced according to the provisions of section 13A-5-43(d). (Acts 1981, No. 81-178, p. 203, § 4.)

Collateral references. — 22 C.J.S., Criminal Law, § 424(4); 22A C.J.S., Criminal Law, § 566.
21 Am. Jur. 2d, Criminal Law, §§ 484, 495.

29 Am. Jur. 2d, Evidence, §§ 125, 1170-1172.
Guilty plea safeguard as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 ALR4th 61.

§ 13A-5-43. Trial of capital offenses; discharge of defendant; lesser included offenses; sentencing.

(a) In the trial of a capital offense the jury shall first hear all the admissible evidence offered on the charge or charges against the defendant. It shall then determine whether the defendant is guilty of the capital offense or offenses with which he is charged or of any lesser included offense or offenses considered pursuant to section 13A-5-41.

(b) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and not guilty of any lesser included offense or offenses considered pursuant to section 13A-5-41, the defendant shall be discharged.

(c) If the defendant is found not guilty of the capital offense or offenses with which he is charged, and is found guilty of a lesser included offense or offenses considered pursuant to section 13A-5-41, sentence shall be determined and imposed as provided by law.

(d) If the defendant is found guilty of a capital offense or offenses with which he is charged, the sentence shall be determined as provided in sections 13A-5-45 through 13A-5-53. (Acts 1981, No. 81-178, p. 203, § 5.)

Collateral references. — 89 C.J.S., Trial, §§ 487.
76 Am. Jur. 2d, Trial, §§ 1111, 1115, 1173.

§ 13A-5-44. Jury selection and separation; waiver by defendant of jury participation in sentence hearing.

(a) The selection of the jury for the trial of a capital case shall include the selection of at least two alternate jurors chosen according to procedures specified by law or court rule.

(b) The separation of the jury during the pendency of the trial of a capital case shall be governed by applicable law or court rule.

(c) Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the court may waive the participation of a jury in the sentence hearing provided in section 13A-5-46. Provided, however, before any such waiver is valid, it must affirmatively appear in the record that the defendant himself has freely waived his right to the participation of a jury in the sentence proceeding, after having been expressly informed of such right. (Acts 1981, No. 81-178, p. 203, § 6.)

Collateral references. — 50 C.J.S., Juries, § 86.
47 Am. Jur. 2d, Jury, §§ 7, 12, 72, 159.

§ 13A-5-45. Sentence hearing — Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b). Otherwise,

the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. (Acts 1981, No. 81-178, p. 203, § 7.)

I. General Consideration.
II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

The sentencing process must comply with the requirements of the due process clause of the fourteenth amendment. Kyzer v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

But the trial court need not be concerned with whether certain evidence would be admissible under the exclusionary rules of evidence. If the evidence has probative value it may be received, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

The trial court is not obligated to do more than provide a fair opportunity for rebuttal. Where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury. (Acts 1981, No. 81-178, p. 203, § 8.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Sentencing hearing should not serve function of hearing on petition for writ of error coram nobis. Once having litigated this issue before the same judge who conducted the sentencing hearing, and a determination having been made that the allegations were without merit, the defendant had no right to relitigate the same issue and argue contentions which had already been determined to be without factual support. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

Jury not required to make specific findings of aggravating circumstances. — There is no requirement under Alabama's new capital felony statute that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Jury verdict not binding on trial court. — The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

The requirement that the jury fix the punishment at death if it finds the defendant guilty of a capital offense is in no way binding on the trial court as the final sentencing authority. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Act not mandatory where judge empowered to alter jury verdict. — Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the act cannot under any construction be classed as mandatory. Williamson v. State, 370 So. 2d 1054 (Ala. Crim. App. 1978), aff'd, 370 So. 2d 1066 (Ala. 1979), rev'd on remand, 405 So. 2d 698 (Ala. Crim. App. 1981).

But crime charged in indictment cannot be used as both criminal charge and circumstance aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Appellate court does not have statutory authority to reduce penalty and resentence the appellant itself. That duty is vested in the trial court. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

Collateral references. — 24 C.J.S. Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d. Criminal Law, §§ 527, 586.

§ 13A-5-47. Determination of sentence by court; pre-sentence investigation report; presentation of arguments on aggravating and mitigating circumstances; court to enter written findings; court not bound by sentence recommended by jury.

(a) After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.

(b) Before making the sentence determination, the trial court shall order and receive a written pre-sentence investigation report. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court. No part of the report shall be kept confidential, and the parties shall have the right to respond to it and to present evidence to the court about any part of the report which is the subject of factual dispute. The report and any evidence submitted in connection with it shall be made part of the record in the case.

(c) Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case. The order of the arguments shall be the same as at the trial of a case.

(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court. (Acts 1981, No. 81-178, p. 203, § 9.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Legislative intent. — The legislature intended to permit the trial judge to weigh the aggravated circumstances enumerated. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Statute does not unconstitutionally confer right to commute upon judge. — The death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. Beck v. State, 365 So. 2d 985 (Ala. Crim. App.), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

The trial court judge and not the jury is the sentencing authority. Beck v. State, 396 So. 2d 645 (Ala. 1980).

The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Jury not required to make specific findings of aggravating circumstances. — There is no requirement under Alabama's new capital felony statute that the jury make

specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

The sole purpose of requiring that the trial judge, as the sentencing authority, make a written finding of the aggravating circumstance is to provide for appellate review of the sentence of death. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The whole purpose of this section and §§ 13A-5-34 through 13A-5-36 (now repealed) is to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

If no mitigating circumstances exist, the order should so state. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded for court's order to be extended. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in the statute which it found insufficient to outweigh aggravating circumstances, cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

For circumstances, where sentence of life imprisonment without parole was not disproportionate and did not constitute cruel and unusual punishment, see McGinnis v. State, 382 So. 2d 605 (Ala. Crim. App. 1979), cert. denied, 382 So. 2d 609 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1573-1576.

21 Am. Jur. 2d, Criminal Law, §§ 527, 586.

§ 13A-5-48. Process of weighing aggravating and mitigating circumstances defined.

The process described in sections 13A-5-46(e)(2), 13A-5-46(e)(3) and section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death. (Acts 1981, No. 81-178, p. 203, § 10.)

Collateral references. — 24 C.J.S., Criminal Law, § 1573.

21 Am. Jur. 2d, Criminal Law, §§ 527, 584.

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

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(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, p. 203, § 11; Acts 1982, No. 82-567, p. 945, § 1.)

I. General Consideration.
II. Decisions Under Prior Law.

I. GENERAL CONSIDERATION.

Section must be strictly followed. — It is imperative that trial courts in setting out aggravating circumstances follow as closely as possible the strict wording of this section. An inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute will eventually lead to an unconstitutional application of the capital felony statute. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation. This is especially true in death penalty cases. Penal statutes are to reach no further in meaning than their words. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Crime charged in indictment cannot be used as both criminal charge and circumstance aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

A finding of only one aggravating circumstance is sufficient to sustain the death penalty. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes, 100 A.L.R.3d 431.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-35 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33, 13A-5-34, this section and § 13A-5-36 (procedure for sentencing hearing before the judge) (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The language of subdivision (5) cannot have been intended by the legislature to have such an expansive application as to be applied in all felony cases in which death has ensued, for it could be said that one of the purposes of inflicting any death would be to prevent identification by the victim. Ex parte Johnson, 399 So. 2d 873 (Ala. 1979).

The aggravating circumstance listed in subsection (8) was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Finding "aggravation" not listed in section. — The jury, and the trial judge at the sentencing hearing, may find the "aggravation" averred in the indictment was not listed in this section as an aggravating circumstance. The jury or trial judge, as applicable, will weigh the "aggravation" or aggravating circumstance against any mitigating circumstances in determining whether to impose a sentence of death. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

The "capital felony" referred to in this section refers to an intentional killing, not to "kidnapping," "robbery," "rape," etc. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Johnson v. State, 399 So. 2d 857 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

A finding that the homicides were "brutal" fails to conform to this section which requires a finding that the crime was "especially heinous, atrocious or cruel." The crime was in fact brutal, but the statute requires more. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, p. 203, § 12; Acts 1982, No. 82-567, p. 945, § 1.)

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Collateral references. — 24B C.J.S. Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-51. Mitigating circumstances — Generally.

Mitigating circumstances shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to it;

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1981, No. 81-178, § 13.)

I. General Consideration
II. Decisions Under Prior Law

I. GENERAL CONSIDERATION.

Analysis of mitigating circumstances should be based on this section. — The safer practice would be for a trial judge to simply follow the verbiage of this section in negating aggravating circumstances rather than devising his own tests. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Collateral references. — 24B C.J.S. Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-36 are included in the annotations for this section.

The whole purpose of former §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow

for judicial review of a sentence of death fixed by the jury. Kyser v. State, 399 So. 2d 330 (Ala. 1981).

Subdivisions (2) and (6) of this section were concerned with the degree of the accused's mental disability. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

Scheme allows accused to present mitigating evidence. — Alabama's sentencing scheme in death cases broadly allows the accused to present evidence of mitigating circumstances. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

An constitutionally indispensable part of death penalty process. — Alabama's sentencing process in death cases permits consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 82 (1979).

Defendant permitted to introduce any matter relating to mitigating circumstances. — At the sentencing hearing before the jury, the court must permit the defendant to introduce any matter relating to any mitigating circumstances including those enumerated in this section. Beck v. State, 396 So. 2d 645 (Ala. 1980).

But existence of mitigating circumstances does not necessarily require reduction of punishment from death to life imprisonment without parole. They must be considered with, and weighed against, aggravating circumstances and the extent of aggravation of such circumstances. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

A pending charge cannot be considered as criminal history. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

The legislature has indicated that lack of a significant criminal history should operate in a convicted individual's favor, and a court cannot qualify this provision by relying on prior criminal activity which does not rise to the level established by the legislature. Cook v. State, 369 So. 2d 1251 (Ala. 1978).

Where abnormality of defendant's mind is great, the fixation of his punishment at death should not be allowed to stand. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

Appellate court must independently weigh aggravating and mitigating circumstances in a capital case. Lewis v. State, 380 So. 2d 970 (Ala. Crim. App. 1979).

If no mitigating circumstances exist, the order should be state. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

And cause must be remanded to extend court's order. — Where court's order is insufficient because it did not specify mitigating circumstances enumerated in this section which it found insufficient to outweigh aggravating circumstances, cause must be remanded with instructions that court's order be extended to include findings of fact from trial and mitigating circumstances, if any, considered as required by statute. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

Trial court's finding that defendant's age of 23 was insufficient to outweigh aggravating circumstances not error. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

For case where the sentencing court made an independent assessment of the evidence presented and determined, independently of the jury's verdict, that the statutory mitigating circumstances were inapplicable to the appellant, see Kyser v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

§ 13A-5-52. Same — Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death. (Acts 1981, No. 81-178, § 14.)

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982).

Collateral references. — 24B C.J.S., Criminal Law, § 1983(1).

21 Am. Jur. 2d, Criminal Law, § 584.

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

(a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

(b) In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(c) The court of criminal appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed.

(d) After performing the review specified in this section, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall be authorized to:

(1) Affirm the sentence of death;

(2) Set the sentence of death aside and remand to the trial court for correction of any errors occurring during the sentence proceedings and for imposi-

tion of the appropriate penalty after any new sentence proceedings that are necessary, provided that such errors shall not affect the determination of guilt and shall not preclude the imposition of a sentence of death where it is determined to be proper after any new sentence proceedings that are deemed necessary; or

(3) In cases in which the death penalty is deemed inappropriate under subdivision (b)(2) or (b)(3) of this section, set the sentence of death aside and remand to the trial court with directions that the defendant be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 15.)

Cited in Bush v. State, 431 So. 2d 555 (Ala. Crim. App. 1982); Bush v. State, 431 So. 2d 563 (Ala. 1983).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.

5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-54. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1981, No. 81-178, § 16.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-37 are included in the annotations for this section.

This section applies only to persons indicted for capital offenses. Thatch v. State, 432 So. 2d 8 (Ala. Crim. App. 1983).

This section does not require the record to show that appointed counsel has at least five years' prior experience in the active practice of criminal law; it simply requires that the indigent accused be provided such counsel. Absent some tangible indication that the requirements were not met, a court cannot summarily rule, as a matter of law, that the statute was not complied with. Johnson v. State, 399 So. 2d 959 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 973 (Ala. 1981).

Appointment in keeping with section. — Where an attorney has practiced criminal law at the call of the criminal docket in the county for 10 years, his appointment to a case involving a capital felony is in keeping with the provision of this section requiring not less than five years' prior experience in the active practice of criminal law. Jacobs v. State, 371 So. 2d 429 (Ala. Crim. App. 1977), rev'd on other grounds, 371 So. 2d 448 (Ala. 1979).

Cited in Curtis v. State, 424 So. 2d 679 (Ala. Crim. App. 1982).

Collateral references. — 23 C.J.S., Criminal Law, § 979(1).

21 Am. Jur. 2d, Criminal Law, §§ 309-317.

Accused's right to represent himself in state criminal proceeding — modern state cases, 98 ALR3d 13.

§ 13A-5-55. Conviction and sentence of death subject to automatic review.

In all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in section 13A-5-53. (Acts 1981, No. 81-178, § 17.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-34 are included in the annotations for this section.

The whole purpose of §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Scope of review. — Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Collateral references. — 24 C.J.S. Criminal Law, §§ 1643-1647, 1831-1840.
5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-56. Supreme court to promulgate indictment forms, verdict forms and jury instructions.

The Alabama supreme court shall promulgate pattern indictment forms for use in cases in which indictments charging offenses defined in section 13A-5-40(a) are thereafter returned. The Alabama supreme court shall also promulgate pattern verdict forms and pattern jury instructions for the trial and sentencing aspects of cases tried thereafter under this article, insofar as such verdicts and instructions relate to the particularities of cases tried under this article. (Acts 1981, No. 81-178, § 18.)

Collateral references. — 42 C.J.S. Indictments and Informations, § 35. 88 C.J.S. Trial, §§ 326, 327. 89 C.J.S. Trial, § 492.
41 Am. Jur. 2d, Indictments and Informations, § 44. 75 Am. Jur. 2d, Trial, §§ 604-640. 76 Am. Jur. 2d, Trial, § 1141.

§ 13A-5-57. Application of article to conduct after effective date.

(a) This article applies only to conduct occurring after 12:01 A.M. on July 1, 1981. Conduct occurring before 12:01 A.M. on July 1, 1981 shall be governed by pre-existing law.

(b) Sections 13A-5-30 through 13A-5-38 are hereby repealed. All other laws or parts of laws in conflict with this article are hereby repealed. This repealer shall not affect the application of pre-existing law to conduct occurring before 12:01 A.M. on July 1, 1981. (Acts 1981, No. 81-178, p. 203, §§ 19, 20.)

Code commissioner's note. — Acts 1982, No. 82-567, § 1, designated the first paragraph of this section as subsection (a) and added subsection (b).

Acts 1981, No. 81-178, § 20, provides that the repeal of §§ 13A-5-30 through 13A-5-38 shall not affect the application of pre-existing law to conduct occurring before July 1, 1981.

Cited in Bush v. State, 431 So. 2d 561 (Ala. 1983).

Collateral references. — 22 C.J.S. Criminal Law, §§ 13, 24.1-24.3.
21 Am. Jur. 2d, Criminal Law, §§ 16, 17.

§ 13A-5-58. Interpretation of article.

This article shall be interpreted, and if necessary reinterpreted, to be constitutional. (Acts 1981, No. 81-178, § 21.)

Collateral references. — 22 C.J.S. Criminal Law, § 13.
21 Am. Jur. 2d, Criminal Law, § 14.

§ 13A-5-59. Application of article upon finding of unconstitutionality.

It is the intent of the legislature that if the death penalty provisions of this article are declared unconstitutional and if the offensive provision or provisions cannot be reinterpreted so as to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that the defendants who have been sentenced to death under this article shall be re-sentenced to life imprisonment without parole. It is also the intent of the legislature that in the event that the death penalty provisions of this article are declared unconstitutional and if they cannot be reinterpreted to provide a constitutional death penalty, or if the death penalty is ever declared to be unconstitutional per se, that defendants convicted thereafter for committing crimes specified in section 13A-5-40(a) shall be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 23.)

Collateral references. — 22 C.J.S. Criminal Law, § 25.
21 Am. Jur. 2d, Criminal Law, § 14.

OPINION

SUPREME COURT OF THE UNITED STATES

ARTHUR JONES *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 84-6089. Decided March 18, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Spaziano* v. *Florida*, 468 U. S. ——, —— (1984) (STEVENS, J., dissenting); cf. *Heiney* v. *Florida*, 469 U. S. —— (MARSHALL, J., dissenting from the denial of certiorari) (1984).

In *Spaziano* v. *Florida*, this Court upheld the constitutionality of a state sentencing scheme under which, if the judge could make certain specified findings, he was given authority to override a jury decision for life. This case, however, presents the problem of a state's decision to give its judges unguided discretion to overturn such jury decisions. I see this as an important issue of capital sentencing law, and so would grant the petition.

In *Spaziano*, as in this case, after a full hearing, a jury determined that death was not the appropriate punishment. Nevertheless, as in this case, the trial judge overrode that determination and sentenced the defendant to die. In rejecting Spaziano's argument that his death sentence had been meted out in an unconstitutionally arbitrary manner, this Court noted that, under Florida law, the trial judge could not

exercise free-wheeling discretion. To the contrary, Florida had forbidden its trial judges to reject such jury decisions unless the evidence favoring death was "so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). This Court rejected Spaziano's allegation of arbitrariness and emphasized "the significant safeguard the *Tedder* standard affords a capital defendant." *Spaziano*, 468 U. S., at ——. "We are satisfied," the Court declared, "that the Florida Supreme Court takes that standard seriously." *Ibid.*

In the opinion below, 456 So. 2d 380 (1984), however, the Alabama Supreme Court has made clear that under that State's system a trial judge need make no finding with respect to a jury verdict of life comparable to that which *Tedder* requires of Florida judges. The Alabama trial judge must simply "consider" the jury's "advisory" sentence. Ala. Code 13A–5–47(e) (1975). This duty to "consider" may apparently add up to little more than the authority to reject a jury sentence when a judge disagrees with it. Such simple disagreement is illustrated by this case, where the trial judge independently reviewed the evidence, made findings, weighed aggravating and mitigating circumstances (all of which had previously been done by the jury), and then determined that the jury had simply been wrong—for in the judge's view death was appropriate "beyond a reasonable doubt and to a moral certainty." 456 So. 2d 366, 379 (Ala. Crim. App. 1983). But the jury was not criticized for irresponsibility or irrationality; to the contrary, the trial judge explicitly stated that it was "not chastising or inferring that the jury was lax in their responsibility." *Ibid.* The judge simply stated "that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and businesses." *Ibid.* Most glaring is the fact that the judge made absolutely no effort to ascertain on what basis the jury reached the contrary conclusion. Rather, the judge wrote that "the Court must follow the dictates of its own conscience." *Ibid.*

This system is quite different from a system where there is no jury, for here there has been a life sentence determination by a properly selected and instructed jury which has been witness to all the evidence and arguments. Where such a determination has been made, it must at least account for something. Under Florida's *Tedder* rule, a judge must at least engage in the awesome task of determining whether he can say, in spite of a jury's rejection of death, that death was so clearly appropriate that the jury determination was virtually beyond reason. Under Alabama's approach, however, the judge is called on to decide little more than whether he agrees with the jury determination. Alabama asks the trial judge to make an inquiry no different than the one it asks of each juror, and like any "juror," he may express his views of the case. But, under the statute, he plays the role of a "juror" with the exclusive power of decision, so the views of the real jurors become legally irrelevant once he reaches his conclusion. Although he must "consider" the jury's determination, he can reject it without explanation, on no more basis than "considered" disagreement. It approaches the most literal sense of the word "arbitrary" to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.

The Eighth Amendment at least mandates that an execution only be the consequence of a "process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). Here, the judge based the death sentence on his understanding of the evidence and his evaluation of aggravating and mitigating circumstances. But the jury had previously examined the same facts, made findings, evaluated all aggravating and mitigating factors, and reached a

determination that death would be inappropriate. Where such a jury finding has been made, the Eighth Amendment requires more than that the trial judge declare that he has considered but disagrees with the conclusion of that admittedly responsible and informed jury.

JUSTICE POWELL took no part in the consideration or decision of this case.